No. 02-658 Status: ARGUED

Title: Alaska Department of Environmental Conservation, Petitioner
v.
Environmental Protection Agency, et al.

Docketed: October 31, 2002
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (00-70166, -70169, -70175, -70301)
Decision Date: July 30, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 25 2002	Petition for writ of certiorari filed. (Response due December 2, 2002)
Nov 20 2002	Brief of respondent Teck Cominco Alaska Inc. in support of petition filed.
Nov 25 2002	Order extending time to file response to petition to and including January 2, 2003.
Dec 30 2002	Brief amicus curiae of Pacific Legal Foundation filed.
Jan 2 2003	Brief of respondent EPA, et al. in opposition filed.
Jan 2 2003	Brief amicus curiae of Center for Energy and Economic Development filed.
Jan 2 2003	Brief amicus curiae of North Dakota, et al. filed.
Jan 13 2003	Reply of petitioner AK Dept. of Environmental Conservation filed.
Feb 24 2003	Petition GRANTED.
Feb 25 2003	Brief amicus curiae of North Dakota, et al. filed.
Apr 2 2003	Extension of time to file the joint appendix and petitioner's brief on the merits to and including April 25, 2003.
Apr 16 2003	Brief amicus curiae of Pacific Legal Foundation filed.
Apr 25 2003	Brief amicus curiae of Nana Regional Corporation, Inc. filed.
Apr 25 2003	Brief amicus curiae of Center for Energy and Economic Development filed.
Apr 25 2003	Brief amicus curiae of National Environmental Development Association, et al. filed.
Apr 25 2003	Joint appendix filed.
Apr 25 2003	Brief of petitioner AK Dept. of Environmental Consevation filed.
Apr 25 2003	Brief of respondent Teck Cominco Alaska Inc. in support of petitioner filed.
May 21 2003	Extension of time within which to file respondents' brief on the merits to and including June 30, 2003.
Jun 26 2003	Further extension of time within which to file respondents' brief on the merits to and including July 11, 2003.
Jul 7 2003	SET FOR ARGUMENT October 8, 2003.
Jul 9 2003	Further extension of time within which to file respondent's brief on the merits to and including July 16, 2003.
Jul 11 2003	CIRCULATED.
Jul 15 2003	Brief amicus curiae of Native Village of Kivalina filed.(Distributed)
Jul 15 2003	Brief amici curiae of Environmental Defense, et al. filed.(Distributed)
Jul 16 2003	Brief of respondents Environmental Protection Agency, et al. filed. (Distributed)
Jul 16 2003	Brief amici curiae of Vermont, et al. filed.(Distributed)
Jul 16 2003	Brief amicus curiae of Northwest Environmental Defense Center filed.(Distributed)
Jul 21 2003	Response of appellants, Mitch McConnell, et al. to application of John McCain, et al. for

	modification of page limit filed.
Jul 31 2003	Record received from the U.S.C.A. 9th Cir. (1 box)
Jul 31 2003	Record received from the U.S. District Court for the District of Alaska. (1 box)
Aug 19 2003	Reply of petitioner Alaska Department of Environmental Conservation. filed. (Distributed)
Aug 20 2003	Reply of respondent Teck Cominco Alaska Inc. filed. (Distributed)
Aug 21 2003	Letter of respondent EPA, et al. filed. (Distributed)
Aug 28 2003	Letter of petitioner AK Dept. of Envtl. Conservation, in response to letter of EPA, filed. (Distributed)
Oct 8 2003	Argued. For Petitioner: Jonathan S. Franklin. For Respondent: Thomas G. Hungar, Deputy Solicitor General.

Supreme Court, U.S.
FILED

No. 02- 02 658 OCT 25 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska—which had been delegated permitting authority under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*—in conflict with decisions of this Court and other federal courts of appeals establishing the division of federal-state jurisdiction under the Act and similar statutory programs.

PARTIES TO THE PROCEEDING

The State of Alaska, Department of Environmental Conservation, and Teck Cominco Alaska, Inc. were petitioners in the Ninth Circuit below. The United States Environmental Protection Agency ("EPA"), and Carol M. Browner and Chuck Clarke in their official capacities as Administrator of the EPA and Regional Administrator of the EPA's Region 10, respectively, were originally named as respondents below. Ms. Browner and Mr. Clarke have since been succeeded by Christie Whitman and L. John Iani, respectively.

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IN THE

Supreme Court of the United States

No. 02-

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner State of Alaska, Department of Environmental Conservation ("ADEC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 298 F.3d 814 and reproduced in the appendix hereto ("App.") at 1a. The Ninth Circuit's prior opinion concluding that it had jurisdiction over this case is reported at 244 F.3d 748 and reproduced at App. 17a. The Ninth Circuit's order request-

ing supplemental briefing is reproduced at App. 24a. The orders of the United States Environmental Protection Agency ("EPA") are reproduced at App. 26a, 38a, and 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 30, 2002. App. 1a. The jurisdiction of the Ninth Circuit was based on 42 U.S.C. § 7607(b)(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 165(a)(4) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, provides, in pertinent part:

> (a) Major emitting facilities on which construction is commenced. No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
>
> (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this Act emitted from, or which results from, such facility * * *. [42 U.S.C. § 7475(a)(4).]

Section 169(3) of the CAA provides, in pertinent part:

> (3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *. [42 U.S.C. § 7479(3).]

INTRODUCTION

This case raises important and recurring issues concerning the ability of the States to exercise their statutory authority under the Clean Air Act ("CAA")—one of the Nation's most significant and far-reaching environmental statutes. Described as an "experiment in federalism," *Michigan* v. *EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (quotation omitted), the CAA assigns to the States an important—indeed *primary*—role in air pollution prevention and control. One of the States' principal responsibilities under the Act is to prevent the degradation of air quality in those areas where national clean air standards have been attained. To this end, the CAA prohibits the construction or modification of a "major emitting facility" in any "clean air" area unless the facility is subject to the "best available control technology," or "BACT." 42 U.S.C. § 7475(a)(4). BACT is defined in the CAA as "an emission limitation * * * which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *." *Id.* § 7479(3) (emphasis added). The "permitting authority" in this case—and in most cases arising under this provision—is the State. *See* App. 3a.

The CAA thus by its terms gives the States the authority to determine BACT for a particular source, and allows the States broad discretion in making that determination. This is confirmed by the Act's legislative history: "The decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility *with the State*, to be determined in a case-by-case judgment. It is recognized that the phrase has *broad flexibility* in how it should and can be interpreted, depending on site." S. Rep. No. 95-127, at 31 (1977) (emphases added).

In 1999, the State of Alaska issued a permit for the construction of a new electric generator at the Red Dog Mine in

Northwest Alaska, 100 miles north of the Arctic Circle. In accordance with the CAA and the State's own regulations, the State determined that a particular technology—"Low NOx"—was BACT to control nitrogen oxide emissions from the new generator. In making that determination, the State expressly took into consideration "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3).

Under the guise of exercising its enforcement authority under the CAA, the EPA issued a series of orders prohibiting the construction of the generator because the federal agency disagreed with the State's determination that Low NOx was BACT for the new generator. In seeking to override the State's BACT determination in this manner, the EPA usurped authority that the CAA clearly delegates to the States, upsetting the balance of power that Congress carefully sought to create under the Act. In conflict with decisions of this Court and other federal courts of appeals, the Ninth Circuit sanctioned that result.

The Ninth Circuit's decision poses a grave threat to the ability of the States to exercise the statutory authority vested in them by Congress to make BACT and other important discretionary decisions under the Act. The question presented is a recurring one of national importance, arising not only under the CAA but a broad range of other federal statutes with similar shared authority between the States and federal government. This Court should grant certiorari to resolve the conflict engendered by the Ninth Circuit's decision, and to preserve the delicate balance of power that Congress established under the CAA and similar statutes.

STATEMENT OF THE CASE

Statutory and Regulatory Background. The CAA establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that "air pollution prevention * * * and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id.* § 7407 ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State"). Thus, while the CAA assigns to the EPA the responsibility for establishing national ambient air quality standards ("NAAQS"), *see id.* § 7409, the Act gives the States the responsibility for implementing those standards. *See id.* §§ 7407, 7410.

To this end, the CAA requires the States to adopt and submit for the EPA's approval a state implementation plan ("SIP") that provides for attainment and maintenance of the NAAQS. *See id.* § 7410. If a State does not have an approved SIP in place, the Act requires the EPA to adopt and implement a federal implementation plan. *See id.* § 7410(c). The EPA may delegate to a State the authority to implement and enforce any part of such a plan. *Id.* § 7410(c)(3).

The CAA requires that each SIP contain emission limitations and such other provisions as may be necessary "to prevent significant deterioration of air quality" in "attainment" areas. *Id.* § 7471. An "attainment"—or "clean air"—area is one "that meets the [NAAQS] for [a given] pollutant." *Id.* § 7407(d)(1)(A)(ii). The Act establishes maximum allowable increases (or increments) of certain pollutants in clean air areas. *Id.* § 7473. To ensure that such increments are not exceeded, the Act also establishes a preconstruction review process that must be followed before the construction or modification of a "major emitting facility" in a clean air area. *Id.* § 7475. As part of that process, the Act requires that each SIP contain a Prevention of Significant Deterioration ("PSD") permit program, and provides that no major emitting facility may be constructed in a clean air area without a PSD permit. *Id.* §§ 7410(a)(2)(C), 7475(a).

The Act also provides that no major emitting facility may be constructed or modified unless "the proposed facility is subject to the best available control technology [or "BACT"] for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility." *Id.* § 7475(a)(4). BACT is defined as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *. [*Id.* § 7479(3) (emphasis added).]

Factual Background. The State of Alaska is a clean air area with respect to nitrogen dioxide, a regulated pollutant under the Act. Under Alaska's SIP, approved by the EPA in 1983, the State operates a PSD permit program through its Department of Environmental Conservation ("ADEC"). Before a PSD permit will be issued for the construction of a new source within the State, the Alaska SIP requires "a demonstration that [a] proposed limitation represents the best available control technology for each air contaminant and for [the] source." 18 Alaska Admin. Code § 50.310(d)(3).

The Red Dog Mine, the world's largest source of zinc concentrate, is located in the harsh landscape of Northwest Alaska, about 100 miles north of the Arctic Circle. The mine is operated by Teck Cominco Alaska, Inc. ("Cominco") in partnership with the Northwest Arctic Native Association ("NANA")[1] on lands owned by NANA. Operating 365 days

[1] NANA is a regional corporation established by Congress pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq*. NANA is the regional corporation organized for the benefit of the Inupiat Eskimos residing in Northwest Alaska.

a year, the mine is the largest private employer in the Northwest Arctic Borough, a vast and isolated area with an historically high unemployment rate. Due to its remote location, the mine requires an independent, on-site power source. The mine is currently powered by six diesel-fired electric generators, designated "MG-1' through "MG-6," which were constructed pursuant to PSD permits issued by ADEC in 1988 and 1994.

In April 1996, Cominco initiated a project to boost the mine's output—and in the process create nearly 100 new jobs. Because the project required the use of more electricity, Cominco in June 1998 submitted an application to ADEC for a new PSD permit, requesting permission to increase the amount of nitrogen oxide ("NOx"), a precursor to nitrogen dioxide, from its MG-5 generator. Cominco's application proposed the use of "Low NOx"—a process that reduces the amount of NOx that would otherwise be released into the environment—as BACT for the MG-5 generator. In April 1999, Cominco amended its application, proposing to install Low NOx on all six of its existing generators—including the five not subject to a new BACT determination—as well as on a proposed new generator, "MG-17," which—like MG-5—was also subject to BACT.

In May 1999, ADEC issued a draft PSD Permit and a preliminary Technical Analysis Report ("TAR") in which it accepted Cominco's amended proposal because it would reduce *total* NOx emissions from the Red Dog Mine to a level comparable to or lower than that which would result were another control alternative evaluated during ADEC's review process—Selective Catalytic Reduction ("SCR")—installed on only the MG-5 and MG-17 generators. *See* App. 4a. ADEC published the draft PSD Permit and preliminary TAR for public comment and review.

In July 1999, after the close of the public comment period, the EPA commented on Cominco's application for the first

time, expressing its view that SCR was BACT for the MG-5 and MG-17 generators—even though SCR had never before been determined to be BACT to reduce NOx emissions from a similar diesel-fired electric generator. In September 1999, after considering all public comment—including the EPA's belated input—ADEC issued a final draft permit and a final draft TAR concluding that Low NOx was BACT for the MG-5 and MG-17 generators. In response to the EPA's continuing objections, ADEC worked with the federal agency in an effort to resolve their differences. Although the dispute over BACT for the MG-5 generator was resolved when Cominco decided to restrict emission increases from the generator to avoid BACT review, the parties could not agree on BACT for the proposed new generator, MG-17.

After a period of unsuccessful negotiations, ADEC on December 10, 1999 issued the PSD Permit and a final TAR, in which ADEC spent nearly ten pages explaining the basis of its carefully considered determination that Low NOx was BACT for the MG-17 generator. *See* PER 044-053.[2] In making that determination, ADEC considered the "energy, environmental, and economic impacts and other costs" associated with other technologies, including SCR. 42 U.S.C. § 7479(3). Moreover, although not required to do so, ADEC followed the EPA's "top-down" approach—used by the EPA when it acts as the PSD permitting authority in those circumstances where a State does not have a PSD program—in determining BACT.[3] Under that approach, ADEC (1) identified all NOx control technologies; (2) identified which technologies were technically feasible; (3) ranked the feasible control technologies in order of effectiveness; (4) considered the energy, environmental, and economic impacts of the feasible technologies and determined which to eliminate based on such impacts; and (5) selected Low NOx as the most effective technology not eliminated.

[2] Petitioners' Combined Excerpts of Record below are cited as "PER."

[3] As the EPA acknowledges, "top-down analysis is not a mandatory methodology." EPA 9th Cir. Br. 12 (quotation omitted).

In considering the "energy, environmental, and economic impacts and other costs" associated with SCR, ADEC discounted Cominco's contention that requiring SCR would have adverse environmental and energy impacts. ADEC concluded, however, that SCR would have an adverse economic impact because, among other things, the "excessive economic cost" of SCR—$2.9 million in capital costs and annual operating costs approaching $635,000—could adversely affect the mine's "world competitiveness," with attendant adverse consequences for the precarious economy of the Northwest Arctic Borough. PER 051. Accordingly, ADEC determined that SCR was not economically feasible. Yet because Cominco had agreed to install Low NOx on *all* its generators—not just the MG-17 generator subject to ADEC's BACT determination—ADEC's permit decision was expected to reduce NOx emissions to a level comparable to or *lower* than that which would result if SCR were installed on only the MG-17 generator. *See* App. 4a.

The EPA's Orders. In an attempt to prevent ADEC from issuing the PSD Permit to Cominco, the EPA on December 10, 1999 issued a Finding of Noncompliance and Order to ADEC. App. 26a. According to the EPA, ADEC's issuance of the final draft permit would not be in compliance with the requirements of the CAA or Alaska's SIP relating to the construction or modification of new or existing sources. App. 36a. The EPA thus ordered ADEC to withhold issuance of Cominco's permit designating Low NOx as BACT until ADEC demonstrated to the EPA's satisfaction that SCR was not BACT for the MG-17 generator or that the issuance of the permit was otherwise in compliance with the CAA and Alaska's SIP. *Id.*

The EPA purported to issue its Finding and Order under Section 113(a)(5) of the CAA, which provides that whenever

the Administrator "finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources," the Administrator "may issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies." 42 U.S.C. § 7413(a)(5). The EPA also relied on Section 167 of the CAA, which provides that the Administrator "shall * * * take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of [the CAA's PSD program]." *Id.* § 7477. The Finding and Order did not identify the specific "requirement" of the Act with which ADEC supposedly had failed to comply, and the Act itself specifies that "the permitting authority, on a case-by-case basis," is to determine what constitutes BACT for a particular facility. *Id.* § 7479(3).

Because ADEC had already issued Cominco's permit, the EPA—on February 8, 2000—issued an Administrative Order to Cominco prohibiting the construction of the MG-17 generator until Cominco "demonstrated to the EPA's satisfaction compliance with [the CAA]" and obtained a "valid" PSD permit from ADEC for the MG-17 generator that complied with the CAA and the EPA's December 10, 1999 Finding and Order. App. 49a. Subsequently, on March 7, 2000, the EPA amended its February 8, 2000 order to allow Cominco to perform certain construction activities during the short Alaska summer. App. 62a-63a. The Amended Administrative Order reiterated that Cominco was otherwise prohibited from commencing construction of the MG-17 generator. App. 62a.

Proceedings Below. ADEC and Cominco subsequently filed petitions for review in the Ninth Circuit challenging the EPA's authority to issue the December 10, 1999 Finding of Noncompliance and Order, the February 8, 2000 Administrative Order, and the March 7, 2000 Amended Administrative Order. App. 1a. ADEC and Cominco argued that the EPA had no authority to issue the orders under either Section 113(a)(5) or Section 167 because ADEC had not failed to comply with a "requirement" of the Act. To the contrary, they explained, ADEC had properly exercised its authority under the Act to make BACT determinations on a "case-by-case basis." 42 U.S.C. § 7479(3).

Before issuing its decision, the Ninth Circuit twice sought supplemental briefing from the parties. Shortly after oral argument, after initially rejecting the EPA's contention that the court lacked jurisdiction to consider the petitions because the EPA's orders did not constitute "final agency action," the Ninth Circuit requested further briefing "assessing the impact, if any," of this Court's recent decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001). App. 23a. Later, the court requested additional briefing on "whether it is the state of Alaska (through ADEC) or the EPA that bears the ultimate legal authority and responsibility under the Clean Air Act to determine whether an individual [PSD] permit issued by Alaska pursuant to its State Implementation Plan (SIP) meets the requirements of the Clean Air Act or the SIP." App. 25a.

In the end, the Ninth Circuit upheld the EPA's orders. The court observed that applicants for PSD permits "must fulfill the 'preconstruction requirement' that a 'proposed facility [be] subject to the best available control technology for each pollutant subject to regulation.' " App. 8a (quoting 42 U.S.C. § 7475(a)(4)) (alteration in original). Thus, the court concluded, "subjecting a facility to BACT is both a 'requirement * * * of the chapter relating to the construction of new sources or the modification of existing sources,' under Section 113(a)(5), and a 'requirement[] of this part' under Section 167." *Id.* (alterations in original). "Because the EPA based its orders on the finding that ADEC had not complied with the BACT requirement," the court held, "the orders

were authorized by the plain language of Section 113(a)(5), as 'order[s] prohibiting the construction or modification of any major stationary source in any area to which such requirement applies,' and of Section 167, as orders 'necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." App. 9a.

The Ninth Circuit further held that the CAA's legislative history also compelled the conclusion that "the EPA has the ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP." App. 10a-11a. As support for that conclusion, the court cited the 1970 amendment of the Act authorizing the EPA to publish NAAQs and delegating to the States the responsibility for implementing those standards; the 1977 amendment of the Act adding the Act's PSD provisions; and the 1990 amendment of Section 113(a)(5) allowing the EPA to take action when a State fails to comply with "any requirement or prohibition" relating to new or modified sources. *See* App. 9a-10a. The Ninth Circuit did not address the legislative history most directly on point—that making clear that "[t]he decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility with *the State*, to be determined in a case-by-case judgment." S. Rep. No. 95-127, at 31 (1977) (emphasis added). *See* ADEC 9th Cir Br. 34 (citing legislative history).

Addressing ADEC and Cominco's contention that the EPA lacked the authority to veto ADEC's discretionary judgment based on its difference of opinion as to which technology was BACT, the Ninth Circuit stated that "neither Section 113(a)(5) nor Section 167 contains any exemption for requirements that involve the state's exercise of discretion," and that "[n]othing in the BACT definition of Section 169(3) limits the EPA's authority." App. 11a. The court then went on to hold that the EPA's issuance of the orders was not arbitrary or capricious.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS ON THE ALLOCATION OF FEDERAL-STATE AUTHORITY.

The Ninth Circuit held in this case that "the EPA has the ultimate authority to decide whether [a] state has complied with the BACT requirements of the Act." App. 10a-11a. The CAA, however, squarely places the responsibility for determining BACT with the States, and gives them broad discretion to do so. *See* 42 U.S.C. § 7479(3) (defining BACT as "an emission limitation * * * which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility") (emphasis added); *see also* S. Rep. No. 95-127, at 31 ("The weight assigned to such factors is to be determined by the State."). Because a BACT determination is a discretionary judgment, involving the case-by-case weighing of a variety of factors, there is no single, objectively "correct" BACT determination for any particular source. The fact that a State weighs the pertinent factors differently than the EPA in any particular case does not mean that the State has in any sense violated a requirement of the Act, authorizing the EPA to intervene and overturn the State's judgment.

The CAA does provide that a facility's emissions may not exceed the NAAQS or PSD allowable increments, *see* 42 U.S.C. § 7475(a)(3), and that the application of BACT may not result in emissions that exceed other standards established under the Act, *see id.* § 7479(3). As long as a State observes those statutory parameters—and it is undisputed that Alaska did so here—the only BACT "requirement" imposed by the Act is that a State take into account "energy, environmental, and economic impacts and other costs" in

determining BACT. If a State takes such factors into consideration—as Alaska plainly did here—the EPA has no authority to override a BACT determination with which it may disagree.[4] The Ninth Circuit's holding to the contrary is thus not only deeply flawed, but fails to square with decisions of this Court and other federal courts of appeals that have recognized and respected the balance of power between the States and the federal government that Congress established under the Act.

1. More than twenty-five years ago, this Court recognized the CAA's "division of responsibilities" between the States and the federal government in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). In *Train*, the Court observed that the EPA "is plainly charged by the Act with the responsibility for setting the national ambient air standards." But "[j]ust as plainly," the Court emphasized, the EPA "is relegated by the Act to a *secondary* role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id.* (emphasis added). As the Court explained, "[t]he Act gives the [EPA]

[4] The only circumstance—not applicable here—in which the EPA's approval of BACT is required is "in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title [42 U.S.C. § 7411] has been promulgated subsequent to August 7, 1977, for such source category." 42 U.S.C. § 7475(a)(8). This narrow exception proves the rule—that Congress otherwise did not intend the EPA to be the "ultimate authority" with respect to a State's BACT determination. App. 11a. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) (where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [Act's] standards." *Id.* (emphasis added). "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id. See also Union Elec. Co.* v. *EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent").

2. Unlike the Ninth Circuit below, other federal courts of appeals have respected the "division of responsibilities" set out in the CAA and have firmly rebuffed attempts by the EPA to usurp authority that Congress has clearly reserved for the States. Not surprisingly, the Ninth Circuit's decision conflicts in this regard with numerous decisions of the D.C. Circuit—the court vested with exclusive jurisdiction over petitions for review of the EPA's promulgation of national standards, rules, and regulations under the CAA. *See* 42 U.S.C. § 7607(b)(1).

For instance, the Ninth Circuit's decision conflicts with the D.C. Circuit's recent decision in *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (D.C. Cir. 2002), a case involving the States' authority to make determinations very much like the BACT determination at issue here. *American Corn Growers* involved the States' authority to determine the best available retrofit technology ("BART") for certain stationary sources under the Act. The Act requires the States to determine BART for particular sources and provides that in determining BART each State "shall" take into consideration five enumerated statutory factors. *See* 42 U.S.C. §§ 7491(b)(2)(A), (g)(2). The EPA promulgated a rule requiring the States to consider one of the factors on a regional, rather than source-by-source, basis. *See* 291 F.3d at 6. The D.C. Circuit invalidated the rule, holding that it was

"inconsistent with the Act's provisions giving the states broad authority over BART determinations." *Id.* at 8. By dictating that the States make BART determinations in a particular manner, the EPA had impermissibly "constrain[ed] authority Congress conferred on the states." *Id.* at 9.

Just so here. The CAA gives the States broad authority to make BACT determinations for particular sources. By substituting its judgment for the State of Alaska's in this case, the EPA plainly "infringe[d] on [the State's] authority under the Act." *Id.* at 9. The Ninth Circuit's decision sanctioning that result cannot be reconciled with *American Corn Growers*.

The Ninth Circuit's decision also conflicts with the D.C. Circuit's decision in *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1980), the seminal case addressing the CAA's PSD provisions. Amid various challenges to the EPA's initial regulations implementing those provisions, the court addressed the contention that the EPA should be required to promulgate guidelines "detailing the manner in which States may permit consumption of the available increments" of certain pollutants in clean air areas. *Id.* at 363-364. The court made clear that although the EPA may prevent or correct violations of the increment limitations under the Act, "the agency is without authority to dictate to the States their policy for management of the consumption of allowable increments." *Id.* at 361. Those limitations must be observed, the Court held, "but assuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id.* at 364.

In the same vein is the D.C. Circuit's more recent decision in *Virginia* v. *EPA*, 108 F.3d 1397 (D.C. Cir.), *modified on other grounds*, 116 F.3d 499 (1997). There, the D.C. Circuit invalidated an EPA regulation requiring certain States to adopt particular motor vehicle emissions standards. Relying on this Court's decision in *Train*, the D.C. Circuit held that

"Congress did not give EPA authority to choose the control measures or mix of measures states would put in their implementation plans." *Id.* at 1410. In sharp contrast to the D.C. Circuit's decisions in *Alabama Power* and *Virginia* v. *EPA*, the Ninth Circuit's decision permits the EPA to "dictate to the States" a matter plainly within their discretion—what constitutes BACT with respect to a particular facility.

3. The conflict between the decision below and the decisions of the D.C. Circuit alone provides a compelling basis for review. But the conflict created by the decision below is by no means limited to the D.C. Circuit. For instance, in *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579 (1981), the Fifth Circuit rebuffed the EPA's attempt to require the State of Florida to include a particular provision in its SIP. Florida had submitted a proposed SIP revision to the EPA to allow a particular source to increase its emissions limitations beyond those in Florida's EPA-approved SIP. The EPA approved the SIP revision, but imposed a two-year limit on the increase. Relying on *Train*, the Fifth Circuit held that the EPA's action was clearly "beyond the Congressional mandate." *Id.* at 589. Under the CAA, the court explained, States " 'may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.' " *Id.* at 587 (quoting *Train*, 421 U.S. at 80). "The great flexibility accorded the states," the court went on, "is further illustrated by the sharply contrasting, narrow role to be played by EPA." *Id.* So long as a proposed SIP revision meets the criteria set out in the Act, the EPA has no authority to " 'assume control of a State's emission limitations mix once its initial plan is approved.' " *Id.* (quoting *Train*, 421 U.S. at 80). By attempting to do just that, the EPA had "usurp[ed] state initiative in the environmental realm," thereby "disrupt[ing] the balance of state and federal responsibilities that undergird the efficacy of the Clean Air Act." *Id.* at 589.

The Seventh Circuit's decision in *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028 (7th Cir. 1984) (Posner, J.), is to the same effect. There, too, the court refused to allow the EPA to tread upon the States' authority under the CAA and upset the Act's "division of responsibilities." *Train*, 421 U.S. at 79. The EPA had issued an order partially approving a proposed SIP revision submitted by the State of Michigan. The effect of the "partial approval," however, was to render the proposed SIP revision more stringent than it was as submitted. The Seventh Circuit held that the EPA could not, "in the guise of partial approval," make Michigan's SIP stricter than the State intended. *Id.* at 1036. If the EPA wished to impose tougher standards, it was required to follow the Act's procedures for doing so—namely by promulgating its own regulation in accordance with the Act's criteria. *See id.* at 1035. Under the CAA, the court explained, "[t]he federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends." *Id.* at 1036. In short, the CAA "creates a partnership between the states and the federal government," and the EPA "may not run roughshod over the procedural prerogatives that the Act has reserved to the states." *Id.*

The Ninth Circuit's decision allowing the EPA to "usurp state initiative in the environmental realm," *Florida Power & Light Co.*, 650 F.2d at 589, is squarely at odds with these decisions. Moreover, as the Seventh Circuit's decision in *Bethlehem Steel* makes clear, when the EPA prefers that a State take a particular action, the EPA must follow proper procedures. As ADEC explained below, the proper recourse for the EPA in this case was not to veto the State's discretionary judgment by regulatory fiat, but rather to participate in the public comment process on Cominco's draft permit and then, if it still disagreed with the State's action after that process, challenge ADEC's BACT determination through the

State's administrative review process. *See* ADEC 9th Cir. Br. 53-56; PER 390-391. *See also* 42 U.S.C. § 7475(a)(2) (requiring opportunity for interested persons "including representatives of the Administrator" to submit comments on "control technology requirements" before PSD permit may be issued). Alaska's laws and SIP permit any party that participated in the public comment process to pursue an administrative appeal of a permit decision, followed by judicial review. *See* 18 Alaska Admin. Code § 50.315; Alaska Stat. § 46.14.200.

Contrary to *Bethlehem Steel*, the Ninth Circuit permitted the EPA to bypass those channels and "run roughshod" over the State's prerogatives under the Act. 742 F.2d at 1036. The Ninth Circuit's decision is particularly intolerable as it essentially gives the EPA free rein to invalidate a BACT determination at any time—months, even years, after a permit has been issued and a source has invested in the technology approved by the State. *Cf. United States* v. *AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994) (holding that the EPA could not "mount a collateral attack" on a permit as many as five years after it was issued where the EPA had the "alternative remedy" of a state administrative appeal followed by judicial review). The conflict between the decision below and *Bethlehem Steel* in this regard further underscores the need for this Court's review.

II. THE CONFLICT OVER FEDERAL-STATE AUTHORITY IS A RECURRING ISSUE OF NATIONAL IMPORTANCE.

Although the conflict engendered by the Ninth Circuit's decision alone warrants certiorari, the need for this Court's review is heightened by the important and recurring nature of the question presented. Congress gave the States "great flexibility" to achieve the goals of the CAA, *Florida Power & Light*, 650 F.2d at 587, including the preservation of air quality in clean air areas. As the D.C. Circuit explained in

Alabama Power, "[i]n the allocation of responsibilities made by Congress" with respect to preventing the significant deterioration of air quality, "maximum limitations have been set." 636 F.2d 364. "These must be observed by the states, but assuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id.*

A State's authority to determine BACT for a particular source is "key" to its ability to "manage [its] allowed internal growth" under the CAA. *Id.* at 364. The "flexible approach" chosen by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as *anticipated and desired economic growth for the area*." S. Rep. No. 95-127, at 31 (emphasis added). Congress's decision to make BACT "strictly a State and local decision," *id.*, makes sense, as it is the States—not the EPA—that are most sensitive to particular local needs and concerns.

The Act's requirement that BACT be determined on a "case-by-case," facility-specific basis, 42 U.S.C. § 7479(3), highlights the importance of such local considerations. In this case, for instance, the State of Alaska, taking into account the requisite statutory factors, made a permitting decision that would not only result in cleaner air, but more jobs for a struggling community situated 100 miles north of the Arctic Circle, where geography and the harsh environment pose unique employment challenges and offer few employment alternatives. In reaching its decision, the State considered various site-specific conditions, as well as "the importance of the mine to the regional economy of the Northwest Arctic Borough." PER 387. *See id.* 386-387.

The Ninth Circuit, based more than 2000 miles away in California, was "uncomfortabl[e]" with the State's consideration of the mine's importance to the local economy. App. 16a. But the statute specifically directs that the States

consider "economic impacts" in determining BACT. 42 U.S.C. § 7479(3). *See* S. Rep. No. 95-127, at 31. Allowing the EPA to dictate BACT to the States means allowing the EPA to "assume control" of the States' "developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level consistent with" the limitations set out in the Act. *Train*, 421 U.S. at 80. It also means longer delays in the permitting process while the EPA wrangles with the States over their decisions. That is plainly not what Congress intended. *See* S. Rep. No. 95-127, at 32 ("Nothing could be more detrimental to the intent of [the PSD] section and the integrity of [the] act than to have the process encumbered by bureaucratic delay.").

The Ninth Circuit's decision not only vitiates the States' authority to determine BACT under the CAA, but also threatens the ability of the States to make numerous similar kinds of discretionary decisions under the Act. As noted above, for instance, the Act authorizes the States to determine the best available retrofit technology ("BART") for particular sources by weighing various statutory factors. *See* 42 U.S.C. § 7491(b)(2)(A); *id.* § 7491(g)(2). The Act also authorizes the States, in consultation with the EPA, to exclude from the definition of "small business stationary sources" under the Act's operating permit provisions any category of sources that "the State determines to have sufficient technical and financial capabilities to meet the requirements of [the] Act." *Id.* § 7661f(c)(3)(B). In non-attainment areas, the Act authorizes the States to determine the lowest achievable emissions rate ("LAER") for new and modified major stationary sources. *See id.* §§ 7501(3), 7503(a)(2). Under the Ninth Circuit's holding, the EPA would be free to override these sorts of determinations any time it disagrees with a State's decision.

The potential effect of the Ninth Circuit decision is even more far-reaching. In addition to the CAA, numerous other statutes embody the principle of "cooperative federalism."

See, e.g., New York v. *United States*, 505 U.S. 144, 167-168 (1992) (noting "numerous federal statutory schemes" of this nature, including the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101 *et seq.*). Those statutes also establish regulatory regimes based on shared federal-state responsibility, whereby the federal government sets standards and the States—if they opt to undertake the responsibility—are given broad flexibility in implementing those standards. Such programs "offer States the choice of regulating * * * activity according to federal standards," which promotes underlying values of federalism because "state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *New York* v. *United States*, 505 U.S. at 167-168. The Ninth Circuit decision, by transferring from the State to the EPA core discretionary authority under one of the leading "cooperative federalism" statutory regimes, threatens to undermine the balance of power struck by Congress and accepted by the States when they assumed the responsibilities offered under the Act. This Court should not allow such a troubling decision to stand unreviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-70166, 00-70169, 00-70175 and 00-70301.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

TECK COMINCO ALASKA INCORPORATED,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

TECK COMINCO ALASKA INCORPORATED,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

TECK COMINCO ALASKA INCORPORATED,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL M. BROWNER, ADMINISTRATOR, AND CHUCK CLARKE, REGIONAL ADMINISTRATOR, REGION 10, OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

Argued and Submitted Feb. 13, 2001.
Submission Vacated March 27, 2001.
Resubmitted July 30, 2002.
Filed July 30, 2002.

Before: REINHARDT, WARDLAW, and GOULD, Circuit Judges.

WARDLAW, Circuit Judge.

The Alaska Department of Environmental Conservation ("ADEC") and Teck Cominco Alaska, Inc. ("Cominco") petition for review of three enforcement orders entered by the United States Environmental Protection Agency ("EPA"), which effectively invalidated a Prevention of Significant Deterioration ("PSD") permit issued by ADEC to Cominco. Petitioners challenge the EPA's authority to issue these orders, and argue that the EPA abused its discretion in finding that ADEC's Best Available Control Technology ("BACT") determination did not comply with the requirements of the Clean Air Act and Alaska's State Implementation Plan ("SIP"). We find that the EPA acted within its authority and, further, that it did not abuse its discretion.

I. Background

The Clean Air Act ("the Act"), 42 U.S.C. §§ 7401-7671q, establishes a program for controlling and improving the nation's air quality through a system of shared federal and state responsibility. The Act requires states to submit for the EPA's approval a state implementation plan that provides for attainment and maintenance of the national ambient air quality standards ("NAAQS") promulgated by the EPA. 42 U.S.C. § 7410.

The Act's Prevention of Significant Deterioration program controls the level of degradation in "clean air areas" of the nation by requiring a pollutant-emitting source to obtain a permit before construction. *See* 42 U.S.C. §§ 7470-7492. In implementing the PSD program and permitting process, states can either operate within the federal PSD program, in which the EPA is the PSD permit issuer, or include a PSD program within their own EPA-approved state implementation plan. 42 U.S.C. §§ 7410(a)(2)(C), 7471.

Alaska is a "clean air area" under the Act—that is, its air quality regions are cleaner than the national standards with respect to ozone and nitrogen dioxide. Under Alaska's State Implementation Plan, which the EPA accepted as meeting the Act's requirements in 1983, Alaska, through the Alaska Department of Environmental Conservation, is the PSD permit issuer. *See* Approval and Promulgation of Implementation Plans; Alaska, 48 Fed. Reg. 30623 (July 5, 1983), as amended at 56 Fed. Reg. 19284 (April 26, 1991). For new and modified sources, the Alaska SIP requires "a demonstration that the proposed [emissions control] limitation represents the best available control technology" before ADEC will issue a permit. Alaska Admin. Code tit. 18, § 50.310(d)(3) (1997).

Cominco operates the Red Dog Mine facility ("the Mine"), a major producer of zinc concentrates, in partnership with the Northwest Arctic Native Association, an Alaska corporation. The Mine is approximately 100 miles north of the Arctic Circle and about five miles west of the Noatak National

Preserve. The closest residential communities are the native villages of Kivalina and Noatak.

Due to its remote location, the Mine requires an independent, on-site power source. The current power supply for the Mine consists of six diesel-fired Wartsila 5000-watt generators, labeled "MG-1" through "MG-6," which were constructed under a 1988 PSD permit. In April 1996, Cominco began its Production Rate Increase ("PRI") project to boost the Mine's output of zinc and zinc concentrates. Cominco determined it needed more electricity at the Mine to power the additional mining equipment.

In June 1998, Cominco submitted an application to ADEC for a new PSD permit, requesting permission to increase the amount of nitrogen oxides ("NOx"), a regulated air pollutant, from its MG-5 generator. Cominco's application proposed the use of "Low NOx" as BACT for MG-5. Low NOx is a process that uses high-combustion air temperatures to better atomize toxic particles, thereby reducing the amount of NOx released into the environment. A review by ADEC, however, reached the contrary conclusion that Selective Catalytic Reduction ("SCR"), a process in which exhaust is injected with ammonia or urea and then combined with a catalyst, was BACT for MG-5.

Cominco responded by amending its application in April 1999. As an alternative to installing SCR on MG-5, Cominco volunteered to install the less costly Low NOx technology on all six of its existing generators, including those not subject to BACT standards, and on a proposed seventh generator, "MG-17."

In its May 4, 1999 Preliminary Technical Analysis Report, ADEC accepted Cominco's proposal because it would reduce the total NOx output from the Mine to a level comparable to that which would result were SCR installed in only the MG-5 and MG-17 generators.

In July 1999, the EPA entered the discussion over Cominco's application at the urging of the National Park Service, which had expressed concern that the "[n]itrogen

oxide emissions . . . could affect vegetation at Cape Krusenstern National Monument and Noatak National Preserve." In a letter to ADEC, the EPA stated that SCR was the best available control technology for the MG-5 and MG-17 generators, and that "the PSD program does not allow the imposition of a limit that is less stringent than BACT even if the equivalent emission reductions are obtained by imposing new controls on other emission units."

On September 3, 1999, ADEC issued a Final Technical Analysis Report and permit decision, concluding that SCR was not economically feasible and that Low NOx was instead BACT. The EPA responded with a review of ADEC's report, asserting that ADEC's cost-effectiveness estimate for SCR was "well within the range that the EPA considers reasonable," and that Cominco had not adequately demonstrated why SCR was economically infeasible.

ADEC, Cominco, and the EPA met to discuss the pending PSD permit, agreeing to install Low NOx on MG-1, MG-3, MG-4, and MG-5, but without agreeing on BACT for MG-17.

After further unsuccessful negotiations, the EPA issued a "Finding of Noncompliance Order" on December 10, 1999, stating that ADEC's authorization of Cominco's construction and installation of new equipment was not in compliance with the Clean Air Act and the Alaska SIP. Pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, the EPA ordered ADEC to withhold issuance of Cominco's PSD permit.

Later that same day, however, in disregard of the EPA's order, ADEC issued the PSD permit along with a second Final Technical Analysis Report.

On February 8, 2000, the EPA sent a letter to ADEC with a formal finding that the December 10, 1999 report and PSD permit failed to comply with federal and state PSD requirements. On the same day, the EPA issued a second order to Cominco preventing the company from beginning construction on the MG-17 generator until Cominco had demon-

strated to the EPA's satisfaction compliance with the Act and the SIP.

The EPA's third order, dated March 7, 2000, modified the February 8, 2000 order to allow Cominco to engage in summer-dependent construction activities.

On April 25, 2000, the EPA withdrew its December 10, 1999 order prohibiting ADEC from issuing the permit. In an accompanying letter, however, the EPA emphasized that its findings of noncompliance in the December 10, 1999 and February 8, 2000 orders remained unchanged.

ADEC and Cominco petition this court for review of the December 10, 1999 Finding of Noncompliance and Order; the February 8, 2000 Administrative Order; and the March 7, 2000 Amended Administrative Order. Petitioners claim that the EPA exceeded its authority by issuing enforcement orders invalidating ADEC's issuance of Cominco's PSD permit, and that ADEC acted within its discretion when making its BACT determination.

II. Procedural History on Appeal and Jurisdiction

The EPA initially challenged our subject matter jurisdiction in a motion to dismiss, which we denied without prejudice, and again in conjunction with the merits of the appeal. In an order dated March 27, 2001, *Alaska v. United States EPA*, 244 F.3d 748 (9th Cir. 2001), we determined that we have jurisdiction pursuant to Section 307(b)(1) of the Clean Air Act because the EPA's Administrative Orders to ADEC and Cominco constitute final agency action. 42 U.S.C. § 7607(b)(1) (granting jurisdiction to review final actions of the Administrator). Applying the test in *Bennett v. Spear*, 520 U.S. 154 (1997), we held that the EPA's actions were final for the purposes of appellate review because the EPA's findings represented its "final position on the factual circumstances," the orders had determined the rights and obligations of the parties, and legal consequences would follow if Cominco chose to disregard the orders and commence construction. *Alaska,* 244 F.3d at 750.

To address Petitioners' contention that the record was incomplete, we also directed the EPA to submit a complete administrative record, withdraw its orders, or file an action in district court. The EPA submitted a declaration that the record was, in fact, complete. On August 3, 2001, we directed Petitioners to respond to the EPA's declaration. In their responses, all the parties effectively agreed that the record as it stood was adequate to resolve the issues on appeal.

On February 28, 2002, in light of the parties' agreement as to the completeness of the record, we requested supplemental briefing on the question of the EPA's authority to issue the orders. Having resolved these preliminary disputes, we now turn to the merits of the appeal.

III. Authority of the EPA

We agree with the EPA that the plain text, structure, and history of the Act compel the conclusion that the administrative orders fell within the EPA's enforcement and oversight authority.

Under the traditional method of statutory construction, the interpretation of a statute "begin[s] with the plain meaning of its language." *In re Bonner Mall Partnership*, 2 F.3d 899, 908 (9th Cir. 1993). "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted).

The EPA's enforcement powers are outlined in Section 113(a)(5), 42 U.S.C. § 7413(a)(5), and Section 167, 42 U.S.C. § 7477, of the Act.

Section 113(a)(5) provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—

> (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;
>
> (B) issue an administrative penalty order in accordance with [42 U.S.C. § 7413(d)], or
>
> (C) bring a civil action under [42 U.S.C. § 7413(b)].

42 U.S.C. § 7413(a)(5). The referenced "chapter" includes the PSD permit program in "Part C—Prevention of Significant Deterioration of Air Quality." *See* 42 U.S.C. § 7475; H.R. Rep. No. 101-490(I), pt. 10, at 391 (1990) (Section 113(a)(5) "authorizes enforcement actions where a State is not acting in compliance with any requirement of Part C or Part D of Title I.").

Under Section 167, the Administrator "shall . . . take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part. . . ." 42 U.S.C. § 7477. "This part" refers to Part C, which establishes the PSD program.

The PSD program is implemented through a permitting system for new and modified "major emitting facilities" in clean air areas. 42 U.S.C. §§ 7475, 7479(1). To receive a permit, the applicant must fulfill the "preconstruction requirement" that a "proposed facility [be] subject to the best available control technology for each pollutant subject to regulation. . . ." 42 U.S.C. § 7475(a)(4). Thus, subjecting a facility to BACT is both a "requirement . . . of the chapter relating to the construction of new sources or the modification of existing sources" under Section 113(a)(5), and a "requirement[ ] of this part" under Section 167. *See* S. Rep. No. 95-127, at 12 (1977), *reprinted in* 3 *A Legislative History of the Clean Air Act Amendments of 1977*, at 1386 (Comm. Print 1978) ("[T]here is a national requirement that each new major facility to be located in a clean air area install the best available control technology.").

BACT is defined in Section 169(3) as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility. . . .

42 U.S.C. § 7479(3). Here, ADEC, as the "permitting authority," made the initial BACT decision. Because the EPA based its orders on the finding that ADEC had not complied with the BACT requirement, the orders were authorized by the plain language of Section 113(a)(5), as "order[s] prohibiting the construction or modification of any major stationary source in any area to which such requirement applies," and of Section 167, as orders "necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part."

The structure and legislative history of the Act further support the EPA's authority to issue the enforcement orders. Since the original Clean Air Act of 1963, state and local governments have had "primary responsibility" for "the prevention and control of air pollution at its source." *Train v. NRDC*, 421 U.S. 60, 64 (1975); 42 U.S.C. § 7401(a)(3). Following disappointing state response to air pollution concerns, Congress has consistently increased over time federal authority in pollution control.

In 1970, Congress amended the Act, Pub. L. 91-604, 84 Stat. 1676, "in order to assure that the requirements of the act would be met if the State failed to adopt, implement, or enforce the necessary measures." S. Rep. No. 95-127, at 326 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1405; *see Train*, 421 U.S. at 64. Fundamentally restructuring the Act "to create an aggressive federally-orchestrated program for air pollution control," the amendments directed the EPA to publish NAAQS and the states to develop implementation plans to meet them. William V. Luneburg, *Clean Air Act Implementation and the Impact of Whitman v. American*

Trucking Associations, Inc., 63 U. Pitt. L. Rev. 1, 5 (2001); 42 U.S.C. § 7410(a)(1).

In 1977, when it became clear that many areas of the country would not attain the NAAQS by the 1970 Amendments' statutory deadline, Congress extended the deadline and amended the Act, dividing the country into nonattainment areas and clean air areas, and establishing the Prevention of Significant Deterioration program to prescribe allowable levels of air quality degradation in clean air areas. Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 St. Louis U. Pub. L. Rev. 67, 76 (2001). Congress recognized that the states experienced internal industry "pressure . . . to relax their standards with the threat of industrial relocation in other, more permissive States." S. Rep. No. 95-127, at 136-37 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1215. Overarching federal leadership provided "protection for States exercising their right to maintain clean air." *Id.*

The 1990 Amendments strengthened the EPA's enforcement authority in cases where states fail to enforce SIPs or permit requirements. *See* H.R. Rep. No. 101-952, at 348, 358 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3731, 3741. Amendments to Section 113(a)(5) extended enforcement authority to include not only failure to comply with state implementation plan provisions, but also a state's failure to comply with "any requirement or prohibition" of the Act relating to new or modified sources. H.R. Rep. No. 101-490(I), pt. 10, at 391.

Thus, although the state has discretion to make BACT determinations as the permitting authority, the Act provides for EPA enforcement when the state issues a permit based on an improper determination. *See* H.R. Rep. 95-564, at 152 (1977), *reprinted in* 3 *A Legislative History of the Clean Air Act Amendments of 1977*, at 533 (Comm. Print 1978) ("The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit."). Therefore, based upon the plain language and the legislative history of the Act and amendments to it, we hold that the EPA has the

ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP.

ADEC and Cominco contend that the EPA exceeded its authority in issuing the three administrative orders predicated on a finding that ADEC's BACT determination was inadequately justified. They argue that because Section 169(3) gives ADEC, the "permitting authority," discretion to determine BACT, the EPA lacked authority to veto ADEC's judgment based on a mere difference of opinion as to which technology was BACT.

This argument is without merit because neither Section 113(a)(5) nor Section 167 contains any exemption for requirements that involve the state's exercise of discretion. Nothing in the BACT definition of Section 169(3) limits the EPA's authority. It does not follow from the placement of initial responsibility with the state permitting authority that its decision is thereby insulated from the oversight and enforcement authority assigned to the EPA in other sections of the statute.

Petitioners further contend that the EPA's authority extends only to determining whether ADEC satisfied what they term "objective requirements" listed in the Act and the SIP. However, it is not clear what Petitioners mean by "objective requirements," as opposed to, presumably, discretionary requirements. Instead of defining such requirements, Petitioners offer a non-exhaustive list, including: the requirement of a PSD permit, the inclusion of a BACT determination in the permit, compliance with federally set limits on emissions, and consideration of energy, environmental, economic, and other costs. Whereas failure to comply with any of the foregoing objective requirements would justify the EPA's issuance of enforcement orders under Sections 113(a)(5) and 167, Petitioners argue, the state's BACT determination itself is not subject to EPA approval or veto.

In support of this distinction, Petitioners cite *United States v. Solar Turbines, Inc.*, 732 F. Supp. 535 (M.D. Pa. 1989), in which the district court analyzed whether a source's actions constituted a violation of the Act:

> [A] violation is to be assessed against objective standards, namely the source's failure to apply for a permit or receive a permit prior to construction; failure to supply information requested of it by the issuing authority, or failure to comply with specific quantifiable air quality standards or restrictions on emission levels.

Id. 539. However, this case sheds no light on Petitioners' argument because it examined the requirements that a *source* must meet under the Act. Here, the question presented is what requirements the *state* must meet.

In a move that seems to undermine their position, Petitioners also quote a Legal Opinion by the EPA's Office of General Counsel to define what they mean by "objective requirements:"

> [I]n the case of a decision applying best available control technology (BACT) under Section 165(a)(4) for PSD, if a state has met all procedural norms, considered all available control technologies, *and given a reasoned justification of the basis for its decision*, EPA has no grounds on which to challenge a final substantive state decision that does not violate such objective standards.

(emphasis added).

As the emphasized portion demonstrates, this Opinion actually supports the EPA's authority to determine the reasonableness or adequacy of the state's justification for its decision, which is exactly what the EPA did here. The cover letter to the December 10, 1999 Finding of Noncompliance and Order stated the EPA's belief that:

> ADEC's own analysis supports the determination that BACT is selective catalytic reduction (SCR) . . . ADEC's decision in the proposed permit therefore is both arbitrary and erroneous. . . . [T]he State's record reflects that the cost-effectiveness and the collateral issues of energy, environmental, or economic impacts, and other costs, do not justify failure to select SCR as BACT in this case.

Whatever Petitioners mean by "objective requirements," they must concede that the provision of a reasoned justification is one of them. We conclude, therefore, that the EPA had the authority to issue findings and orders on the ground that the State failed to provide an adequate justification for its BACT decision.

IV. Validity of the Orders

Petitioners alternatively argue that the EPA erred in finding that ADEC was not in compliance because ADEC's BACT determination fulfilled all requirements of the Act. The EPA maintains that ADEC's determination that Low NOx was BACT was "nothing short of incomprehensible, unreasoned, and unsupported."

Under the Act, we may reverse a final action by the EPA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); *Exxon Mobil Corp. v. United States EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000). Upon review of the administrative record, we conclude that the EPA did not act arbitrarily or capriciously in issuing its Findings of Noncompliance and Orders prohibiting construction of the MG-17 generator until ADEC produced a valid PSD permit.

A common approach to determining BACT is the "top-down" method, which ADEC purported to apply. Under this method, as detailed in the EPA's *New Source Review Workshop Manual* (1990), the applicant ranks all available control technologies in descending order of control effectiveness. The most stringent technology is BACT unless the applicant can show that it is not technically feasible, or if energy, environmental, or economic impacts justify a conclusion that it is not achievable. *Citizens for Clean Air v. United States EPA*, 959 F.2d 839, 845-46 (9th Cir. 1992). If the top choice is eliminated, then the next most stringent alternative is considered, and so on. The most effective control option not eliminated is BACT. *Id.*

Although the top-down approach is not mandated by the Act, if a state purports to follow this method, it should do so

in a reasoned and justified manner. ADEC's December 10 Technical Analysis Report rejected SCR because it would have adverse economic impacts on the Red Dog Mine. The report states that there are several situations in which a permitting authority can reject a control option for economic considerations: (1) when the applicant, i.e., Cominco, shows that the costs of the control are disproportionately high compared to the cost of control in recent permit decisions; (2) when the cost-effectiveness of the control is outside the range of costs being borne by similar sources in recent BACT determinations; and (3) when the applicant shows the cost of the control option will cause adverse economic impact to the facility.

ADEC's report demonstrates, however, that none of these situations were present. As to the first situation, the report reveals that there were no recent permit decisions involving BACT determinations for diesel engines used as primary power generators.

As to the second, the cost-effectiveness of recent NOx control BACT decisions ranged from $0 to $7,000 per ton of NOx removed. According to ADEC's estimate, the cost-effectiveness of SCR was $2,100 per ton of NOx removed, a cost well within the applicable range.

Finally, ADEC attempted to determine whether the costs of SCR would be excessive by analogizing the costs of the MG-17 generator to the costs of other electric utilities. ADEC began with the assumption that SCR for MG-17 would cost 3 cents per kilowatt-hour. It reasoned that if Cominco "did not have a powerhouse, it would probably buy power from a rural Alaska utility. From a cursory review, it appears that the average cost of electricity in rural-Alaska is approximately 15¢ per kilowatt hour." Because a 3¢ increase would "be equivalent to a 20% increase in the electric rate of the facility," ADEC concluded that "this is a disproportionate cost increase when viewed as an electric utility."

This rationale is unfounded, however, because Cominco does not, in fact, buy power from an electric utility. Therefore, the use of the 15¢ figure is not justified. ADEC itself

acknowledges the flimsiness of its own hypothetical in the report:

> Another perhaps better way to determine if the cost of BACT is excessive, is for the applicant to present detailed financial information showing its effect on the operation. However, the applicant did not present this information. Therefore, no judgment can be made as to the impact of a $2.1 million control cost on the operation, profitability, and competitiveness of the Red Dog Mine.

ADEC's report demonstrates that Cominco failed to show that any of the situations in which a control option can be rejected for cost considerations was applicable. Rather than concluding, logically, that Cominco had failed to show that SCR could be eliminated, ADEC instead invented its own reason for the economic infeasibility of SCR. ADEC described the Mine's "dramatic" reversal of unemployment rates in its borough:

> Before the Mine opened in 1990, borough wages were well below state average wages. . . . The Mine now provides high paying year round employment. . . . Cominco's contractors, vendors, and wages have boosted the borough's private sector economy. . . . With government support and endorsement of Cominco's operations, including the Production Rate Increase Project, the Red Dog Mine will continue to influence and benefit the residents and economy of this region.

ADEC concluded that it had chosen, as the "foremost consideration to judge economic impacts of SCR," the "direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts." To "support Cominco's [PRI Project] . . . and its contributions to the region," ADEC rejected SCR "based on excessive economic cost—$2.9 million capital cost, with annualized costs approaching $635,000." The report fails to explain how the costs of SCR would affect the Mine's world competitiveness or why the capital cost is excessive.

ADEC's apparent motivation for the elimination of SCR—appreciation for Cominco's contribution to the local economy—is not an accepted justification in the top-down approach. Worse still, it is uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority—to protect states from industry pressure to issue ill-advised permits. *See* S. Rep. No. 95-127, at 136.

Because ADEC's report shows that (1) Cominco failed to meet its burden of demonstrating that SCR was economically infeasible; and (2) ADEC failed to provide a reasoned justification for its elimination of SCR as a control option, the EPA did not act arbitrarily and capriciously in concluding that ADEC abused its discretion by making an internally inconsistent and unreasonable BACT determination. The petition for review is therefore

DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-70166, 00-70301, 00-70169, 00-70175.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMINCO ALASKA, INC., AN ALASKA CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CHRISTIE WHITMAN,* ITS ADMINISTRATOR, AND CHUCK CLARKE, REGIONAL ADMINISTRATOR, REGION 10, OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMINCO ALASKA, INC., AN ALASKA CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CHRISTIE WHITMAN, ITS ADMINISTRATOR, AND CHUCK CLARKE, REGIONAL ADMINISTRATOR, REGION 10, OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

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* Pursuant to Fed. R. App. P. 43(c), Christie Whitman is automatically substituted as a party respondent for Carol Browner.

Argued and Submitted Feb. 13, 2001
Filed March 27, 2001

Before: REINHARDT, WARDLAW and GOULD, Circuit Judges.

ORDER

The Alaska Department of Environmental Conservation ("ADEC") and Cominco Alaska, Inc. ("Cominco") petition this Court for review of three enforcement orders (the "Orders") entered by the United States Environmental Protection Agency ("EPA"), which effectively invalidated an air quality construction permit issued by ADEC for the construction of a power generator at Cominco's Alaskan mining facility located about 100 miles above the Arctic Circle. Petitioners challenge the EPA's authority to invalidate the permit under federal and state law. The EPA asserts that it has the authority to regulate such construction under the Clean Air Act ("CAA" or the "Act") and further claims that this Court lacks subject matter jurisdiction to consider ADEC's and Cominco's petitions because the Orders are not "final agency action" subject to review in the United States Courts of Appeal.

We first consider the question of our jurisdiction to review the Orders. The parties agree that we have jurisdiction, if at all, pursuant to section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), which gives the Court jurisdiction over "any . . . final action taken, by the Administrator." The EPA argues that none of the Orders constitutes final agency action and thus none is reviewable.

Each of the Orders is predicated on the EPA's position that the Best Available Control Technology ("BACT") for the proposed new Wartsila generator MG-17 at Cominco's Red Dog Mine facility is Selective Catalytic Reduction as opposed to Low NOx emission reduction, a less costly technology proposed by Cominco and approved by ADEC. In its "Finding of Noncompliance and Order" dated December 10, 1999, the EPA found that the Low NOx emission control for MG-17 does not comply with the CAA or the Alaska State Implementation Plan ("SIP") for the CAA. Pursuant to 42 U.S.C. §§ 7413(a)(5) and 7477, the EPA ordered ADEC to withhold issuance of its proposed Prevention of Significant Deterioration ("PSD") permit for Cominco. Concluding that Low NOx was the appropriate BACT for the MG-17 generator, ADEC, shortly after receiving the December 10, 1999 Order, issued the final PSD permit. In a second order directed to Cominco dated February 8, 2000, finding it "necessary to prevent any further construction or modification at the Red Dog mine facility," the EPA prohibited Cominco from commencing any and all construction or modification activities at the Red Dog Mine facility associated with the Wartsila generator MG-17. The EPA's third order, dated March 7, 2000, modified the February 8, 2000 Order to accommodate the unique weather-related construction limitations present at the Red Dog Mine site and allowed certain preliminary summer construction activities. On April 25, 2000, the EPA withdrew its December 10, 1999 Order directed to ADEC, in light of ADEC's issuance of the construction permit after it received the order, noting that "the Order does not impose any continuing prohibitions or obligations to ADEC." In an accompanying letter, however, the EPA Deputy Regional Administrator stated:

> EPA still believes that the final PSD permit issued to Cominco is not in compliance with the Clean Air Act or the Alaska SIP. Region 10 is withdrawing only the Order portion of the December 10, 1999 document. Thus, the December 10, 1999 and February 8, 2000 Findings under Section [7413(a)(5)] remain unchanged, as does the March 7, 2000 Order issued to Cominco.

ADEC and Cominco petitioned for review of the Orders. Respondents, the EPA, Christie Whitman, and Chuck Clarke, Regional Administrator, Region 10, move to dismiss the petitions for lack of subject matter jurisdiction. The EPA

asserts that the Administrative Orders issued to Cominco and ADEC do not constitute the "final action of the Administrator." In *Bennett v. Spear*, 520 U.S. 154 (1997), recently reaffirmed in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), the Supreme Court explained that two conditions must be satisfied in order for agency action to be "final" for purposes of appellate review: the action must mark the "consummation" of the agency's decision-making process, and it must "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (citation and quotations omitted).

Like the Supreme Court in *Bennett* and *American Trucking*, we have little trouble concluding, especially in light of the representations as to the EPA's position made in oral argument by its counsel, that both *Bennett* conditions are met here. The EPA argues that the Orders are not a "final action," although the findings in the Orders are its "last word" on its position as to Selective Catalytic Reduction as BACT for MG-17 and Cominco is in legal jeopardy if it fails to comply with the Orders. The EPA contends that because it has not actually commenced an enforcement action, the Orders are not subject to review. There is, however, no question that the EPA asserted its final position on the factual circumstances upon which the Orders are predicated: It is EPA's position that if Cominco builds the MG-17 generator using Low NOx it would be in violation of the Act, the Alaskan SIP, and its Orders. The EPA's position is unalterable; according to counsel, it would change only if the circumstances surrounding the construction of MG-17 change.

The "rights or obligations" of the parties have been determined by these Orders. As paragraph No. 49 of the Findings of Fact in the February 8 Order states, the EPA found it "necessary" to issue the Order to "prevent any further construction or modification at the Red Dog mine facility." The EPA is right: The effect of the February 8 Order is to halt construction at Cominco's Red Dog Mine facility at a considerable cost of both time and money to Cominco.

Moreover, "legal consequences will flow," if Cominco chooses to disregard the Order and go forward with construction. As the EPA wrote in its Motion to Dismiss the Petition for Lack of Subject Matter Jurisdiction, "EPA could ask, and the district court could assess, penalties both for Cominco's alleged violation of the Act's PSD requirements and for any alleged violation of the order." At argument EPA counsel explained that the language "could" referred only to its decision to seek enforcement of its Orders and a district court's decision to enforce them. Thus the "could" language did not refer to a tentative conclusion as to the merits by the EPA, or to any ongoing EPA proceedings in that regard; it referred simply to whether the EPA would commence judicial proceedings to remedy what it views irretrievably as a violation of the Act. Under EPA's construction of its Orders, if it decides to institute such proceedings, Cominco and its employees would be subject to criminal and civil penalties for the violation of its Orders, as well as for the violation of the CAA.

Finally, our review will not benefit from further factual development of the record, as the principal issue before us is a legal question—whether it is the state, through ADEC, or the EPA which bears the ultimate responsibility and authority to decide what emissions reductions will be required from which sources, *see* 42 U.S.C. §§ 7410(a), 7411, and whether the EPA acted in an arbitrary and capricious manner in issuing the Orders based on the record before it at the time it made its decision that the use of Low NOx on MG-17 would violate the Act and the PSD provisions of the SIP.

Having determined that the Orders are final and that we have jurisdiction, we do not consider the merits at this time because in order to do so we require, as explained below, the submission of an appropriate administrative record as well as further briefing. Also, because the EPA argued to this Court that the Orders were not "final" and that it had not yet determined whether to seek enforcement in the district court, it seems appropriate to provide the Agency with a fair opportunity either to commence such an enforcement proceeding, as contemplated by 42 U.S.C. § 7413(b), or to

withdraw the Orders, before we proceed further with the petition for review. Thus, we express no view as to (a) whether the EPA has the authority under the CAA to invalidate the ADEC permit, or (b) if so, whether the EPA acted arbitrarily and capriciously in issuing the Orders. Accordingly, we order as follows:

Within 60 days of this order, the EPA may either (1) submit a complete administrative record which will allow this Court to review the justifications for the EPA's decisions to issue the Orders before us; (2) withdraw the Orders that are the subjects of these petitions; or (3) file an enforcement action, pursuant to 42 U.S.C. § 7413(b), in the appropriate United States District Court.[1]

With respect to the first option, the record we would be called upon to review, should we decide that the EPA has the authority to overrule ADEC, is that upon which the EPA relied in its determination that Selective Catalytic Reduction, and not Low NOx, is the BACT for the MG-17. *See* 5 U.S.C. § 706; *Ober v. EPA*, 84 F.3d 304, 313-15 (9th Cir. 1996); *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 597 (1980) (requiring a "meaningful record to review," which "fully comports with the traditional role of appellate courts in reviewing agency decisions that are based on development of factual issues by means of an administrative record"). To the extent necessary to provide a full and complete administrative record of the basis for the agency's final decision and the Orders, the EPA must produce not only documentary evidence but also affidavits of the Administrator or her delegates as needed to permit review. *See Camp v. Pitts*, 411 U.S. 138, 142-43 (1973); *Citizens to*

[1] An enforcement action in the appropriate United States District Court in our view may provide a preferable means of resolving the issues in this case, for the parties in that context will be able to develop a full record on pertinent issues.

Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420-21 (1971) (holding that "since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary . . . to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard"), *overruled on unrelated grounds by Califano v. Sanders*, 430 U.S. 99, 105 1977). Communications setting forth and evaluating alternatives to the Orders must also be included.

Should the EPA opt to submit the administrative record rather than to pursue an enforcement action or to withdraw its Orders, petitioners and respondents are ordered to file, within 21 days of such submission, supplemental briefs, not to exceed 15 pages, assessing the impact, if any, of *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), on the question whether it is the EPA or ADEC which has the ultimate authority to make BACT determinations.

The parties shall provide notice of the status of these proceedings to this Court within 60 days hereof. Submission of this matter is hereby vacated until further notice by this Court.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-70166, 00-70169, 00-70175 and 00-70301

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

COMINCO ALASKA INC., AN ALASKA CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

COMINCO ALASKA INC., AN ALASKA CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

COMINCO ALASKA INC., AN ALASKA CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; CAROL M. BROWNER, ADMINISTRATOR, AND CHUCK CLARKE, REGIONAL ADMINISTRATOR, REGION 10, OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

Filed Feb. 28, 2002

Before: REINHARDT, WARDLAW and GOULD, Circuit Judges.

ORDER

Having considered the recent submissions of the parties agreeing to the factual record on appeal and the briefs filed beginning in June 2000 (almost two years ago), we have determined that supplemental briefing would be of assistance in the determination of the cause. Therefore, it is ORDERED that each side file a supplemental brief not to exceed twenty-five pages within twenty-eight days of the date hereof on the following question: whether it is the state of Alaska (through ADEC) or the EPA that bears the ultimate legal authority and responsibility under the Clean Air Act to determine whether an individual Prevention of Significant Deterioration permit issued by Alaska pursuant to its State Implementation Plan (SIP) meets the requirements of the Clean Air Act or the SIP.

If any party desires additional oral argument in this matter, it should file a request, along with a brief statement of the reasons it believes additional argument is necessary.

It is so ORDERED.

APPENDIX D

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
State of Alaska Department of Environmental Conservation,	)	Docket No. CAA-10-99-0263
	)	FINDING OF NONCOMPLIANCE and ORDER
Proceeding under Sections 113(a)(5) and 167 of the Clean Air Act.	)	(42 U.S.C. §§ 7413 and 7477)

I. FINDING OF NONCOMPLIANCE and ORDER

1. This Finding of Noncompliance and Order is issued by the Regional Administrator, Region 10, United States Environmental Protection Agency (EPA), to the State of Alaska, Department of Environmental Conservation (ADEC), pursuant to Sections 113(a)(5) and 167 of the Clean Air Act (CAA or Act), 42 U.S.C. §§ 7413(a)(5) and 7477.

2. The authority of the Administrator of EPA to issue findings and orders pursuant to Section 113(a)(5) and Section 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, has been delegated to the Regional Administrator. The Regional Administrator has consulted with the Assistant Administrator for the Office of Enforcement and Compliance Assurance pursuant to the delegation of authority from the Administrator.

II. STATUTORY AND REGULATORY AUTHORITY

3. The Administrator of EPA, pursuant to Section 109 of the Act, 42 U.S.C. § 7409, promulgated National Primary and Secondary Ambient Air Quality Standards (NAAQS) for

certain criteria pollutants, including nitrogen dioxide (NO2). 40 C.F.R. §§ 50.4 to 50.12.

4. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgates lists of attainment status designations for each air quality control region (AQCR) in every State. These lists contain the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the Alaska AQCRs appear at 40 C.F.R. § 81.302.

5. Cominco Alaska, Inc. (Cominco) owns and operates the Red Dog mine facility, a surface zinc and lead ore mining operation, which is located in the Northern Alaska Interstate AQCR and is in an area that is in attainment or unclassifiable with respect to the NAAQS. 40 C.F.R. § 81.302.

6. Part C of the Act, 42 U.S.C. §§ 7470-7492, requires the Administrator to promulgate regulations for prevention of significant deterioration (PSD) of air quality in areas designated in accordance with Section 107(d) of the Act, 42 U.S.C. § 7407(d), as in attainment or unclassifiable.

7. Pursuant to Sections 110 and 165(e)(3) of the Act, 42 U.S.C. §§ 7410 and 7471(e)(3), EPA promulgated two sets of largely identical regulations for preventing the significant deterioration of air quality in areas where the existing air quality is better than the ambient standards. In States without a PSD program and in those States where EPA has delegated authority to administer the federal PSD program to the State, the federal PSD regulations at 40 C.F.R. § 51.21 have been incorporated into the various State Implementation Plans (SIPs) of such States. In the remaining States, EPA has approved as part of the SIP a State PSD program, implemented directly by the State, as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R § 51.166.

8. EPA has approved 18 AAC 50.020, 50.021, 50.300, 50.400, 50.510, 50.520, 50.530, 50.600, 50.620, and 50.900, as in effect on June 2, 1988, as a revision to the Alaska SIP and as meeting the requirements of Part C of the Act and the

PSD regulations at 40 C.F.R. § 51.166 for preventing the significant deterioration of air quality. See 40 C.F.R. § 52.96(a). (48 Fed. Reg. 30626, July 5, 1983, and subsequent amendments.) References in this document to Alaska statutory or regulatory provisions are to the current SIP-approved versions of the statute or regulation.

9. Section 165 of the Act, 42 U.S.C. § 7475, prohibits the construction of a major emitting facility in any area subject to the requirements of Part C of the Act and the PSD regulations unless, among other things, a permit has been issued for the proposed facility in accordance with Part C of the Act which sets forth emission limitations that conform to the requirements of Part C, and the proposed facility is subject to best available control technology (BACT) for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

10. "Ambient air" is defined at Alaska Statutes 46.14.99(2)(1993) as "that portion of the atmosphere, external to buildings, to which the general public has access."

11. "Actual emissions" as defined in 18 AAC 50.900(1)(1991) means "for each air contaminant, the average rate in tons per year that a facility actually emitted during the most recent two years of normal operation; the department will, in its discretion, consider facility-specific allowable emissions to be actual emissions of an air contaminant."

12. "Construct" as defined in 18 AAC 50.900(13)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

13. "Allowable emissions" as defined in 18 AAC 50.900(4)(1991) means "the calculated emission rate of a source or facility using the maximum rated capacity and enforceable limitations and conditions on emissions and operations."

14. "Modify" as defined in 18 AAC 50.900(28)(1991) means "to make a change or a series of changes in operation

or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

15. 18 AAC 50.300(a)(1991) states that no person may construct, modify, reconstruct, operate, or cause the operation of a facility meeting the criteria in that subsection without a permit from ADEC. The list of facilities covered by 18 AAC 50.300(a) includes a facility which has allowable emissions of more than 250 tons per year of a regulated air contaminant and which is modified after August 7, 1980, or after the date of the most recent permit issued to the facility under 18 AAC 50.400(c)(3), causing an increase in actual emissions equal to or exceeding any of the thresholds identified in that subsection.

16. A permit application for a facility subject to 18 AAC 50.300(a)(5) or (6) must include, among other things, a detailed demonstration that the expected maximum emissions from the facility will not cause or contribute to a violation of an ambient air standard or allowable increment in 18 AAC 50.020(b).

17. 18 AAC 50.400(c)(3)(A)(1991) states that ADEC will issue a permit only if the applicant shows that, for a facility subject to 18 AAC 50.300(a)(5) or (6), BACT for controlling emissions of each regulated pollutant will be installed for each new or modified source.

18. 18 AAC 50.900(9)(1991) defines "best available control technology" as an emission limitation which represents the maximum reduction achievable for each regulated air pollutant taking into account energy, environmental, and economic impacts, and other costs.

19. Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources, the Administrator may—

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;

(B) issue an administrative penalty order in accordance with subsection (d) of this section; or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

20. Section 167 of the Act, 42 U.S.C. § 7477, provides that the Administrator shall take such measures, including issuance of an order, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of Part C of the Act.

21. Section 169(1) of the Act, 42 U.S.C. § 7479(1), defines a major emitting facility, in pertinent part, as a stationary source which emits or has the potential to emit 250 tons per year or more of any air pollutant.

22. A State does not conform to the requirements of Part C of the Act if, among other things, it allows a major emitting facility to commence construction or modification prior to receipt of a PSD permit or issues a PSD permit to a facility without subjecting the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

23. A major emitting facility does not conform to the requirements of Part C if, among other things, it commences construction or modification prior to receipt of a PSD permit or if the facility is not subject to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

III. FINDINGS OF FACT

24. On June 17, 1988, ADEC issued a PSD permit, Permit No. 8732-AA001, that authorized the construction of the Red

Dog mine facility, including the installation of five Wartsila diesel generators (MG-1, MG-2, MG-3, MG-4, and MG-5).

25. ADEC revised and replaced the June 1988 PSD permit on several occasions, including a revision dated July 27, 1994, Permit No. 9332-AA003, which: (a) removed from the permit a NOx BACT limit of 750 parts per million volume dried (ppmvd) that applied to the five Wartsila diesel generators, and substituted a limit of 109,660,000 kilowatt hours per continuous 365-day period (kW-hr/yr) for MG-1, MG-3, MG-4, and MG-5, (b) removed the stand-by limits on MG-2 and permitted it to operate full-time, and (c) authorized the installation and full-time operation of a sixth Wartsila diesel generator (MG-6).

26. The Red Dog mine facility currently operates under the terms and conditions of Permit No. 9332-AA003, as amended December 4, 1996.

27. On March 27, 1996, prior to receiving an amended PSD permit, Cominco requested that ADEC allow Cominco to make on-site preparations for changes to the facility that would allow for production increases. On April 2, 1996, ADEC granted Cominco a waiver to allow the company to conduct specified procurement and construction activities on the condition that Cominco prepare and submit a request for a permit amendment concurrent with the activities.

28. Between April 1996 and May 1998, Cominco constructed a new gyratory crusher at the Red Dog mine facility without a permit.

29. On June 29, 1998, Cominco submitted a PSD permit application to ADEC for what it referred to as a "production rate increase project" that was expected to increase the mine's ore processing rate from approximately 2,200,000 tons per year to 3,500,000 tons per year and to increase the production of zinc and lead concentrate from 854,000 tons per year to 1,400,000 tons per year. Cominco submitted a supplement to the application to ADEC on April 6, 1999. As part of the production rate increase project, Cominco requested that ADEC, among other things, remove the air

quality operating restrictions on the four Wartsila diesel generators that were installed in 1988 and which still had operational limits on them (MG-1, MG-3, MG-4, MG-5), "add" a seventh Wartsila diesel generator (MG-17), "add" the new gyratory crusher that Cominco had already installed, and approve the addition of other equipment and changes necessary to support the production rate increase project.

30. On May 4, 1999, ADEC issued a preliminary PSD permit (preliminary draft PSD permit) for the production rate increase project for review and public comment. The preliminary draft PSD permit proposed to remove the operational cap of 109,660,000 kW-hr/year that applied to Wartsila diesel generators MG-1, MG-3, MG-4, and MG-5, to "add" the seventh Wartsila diesel generator (MG-17), to "add" the new gyrator crusher, and to approve the addition of other equipment and changes that Cominco requested in its PSD permit application for the production rate increase project.

31. ADEC prepared a preliminary technical analysis report (Preliminary Technical Report) to accompany the preliminary draft PSD permit. The Preliminary Technical Report stated that the production rate increase project is expected to increase actual NOx emissions by up to 1,100 tons per year; carbon monoxide (CO) emissions by 90 tons per year; particulate matter (PM) emissions by 35 tons per year; PM emissions less than 10 micrometers in diameter (PM-10) by 35 tons per year; volatile organic compound (VOC) emissions by 59 tons per year; and lead (Pb) emissions by 0.046 tons per year. The proposed production rate increase project is expected to reduce sulfur dioxide (SO2) emissions by 37 tons per year.

32. In the preliminary draft PSD permit and Preliminary Technical Report, ADEC concluded that, of the seven Wartsila diesel generators, only MG-5 and MG-17 were subject to PSD requirements and therefore required BACT. EPA regulations require that technical and economic feasibility be considered when determining BACT. In the Preliminary Technical Report ADEC determined that Selective Catalytic Reduction (SCR) is a technically and economically feasible emission control technology for the Wartsila generators and that SCR could result in reductions of 712 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report also concluded that installation of low NOx controls would result in reductions of only 273 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report then concluded that BACT for MG-5 and MG-17 was an emission hunt based on low NOx controls.

33. The Red Dog mine facility was at the time of construction and continues to be a "major emitting facility" under Section 169(1) of the Act, 42 U.S.C. § 7479(1).

34. The Red Dog mine facility was at the time of construction and continues to be a facility with allowable emissions, as defined in 18 AAC 50.900(4), of at least 250 tons per year of a regulated air contaminant. The Red Dog mine facility is therefore a "facility," as listed in 18 AAC 50.300(a)(6).

35. The production rate increase project will "modify," as that term is defined in 18 AAC 50.900(28), the Red Dog mine facility.

36. The production rate increase project will increase actual emissions of NOx, PM, PM-10, and VOC from the Red Dog mine facility by more than the thresholds identified in 18 AAC 50.300(a)(6)(C) and will occur after 1980 and after the date of the most recent permit issued for the Red Dog mine under 18 AAC 50.400(c)(3). The Red Dog mine facility and production rate increase project are therefore a "facility," as listed in 18 AAC 50.300(a)(6)(C).

37. The public comment period on the preliminary draft PSD permit for the production rate increase project ended on June 2, 1999.

38. On June 2, 1999, the United States Department of the Interior, National Park Service (NPS), submitted comments on the preliminary draft PSD permit for the production rate increase project. The NPS comments raised several concerns with the preliminary draft PSD permit, including the following:

a. ADEC failed to subject four of the Wartsila diesel generators (MG-1 and MG-3 through MG-5) to PSD, including BACT. These generators are part of the production rate increase project because the preliminary draft PSD permit would remove an operating restriction on these generators.

b. ADEC failed to require SCR on the two Wartsila diesel generators which ADEC acknowledges are subject to BACT (MG-5 and MG-l7). SCR is BACT for the Wartsila diesel generators.

39. By letter dated July 29, 1999, EPA informed ADEC that it agreed with NPS's comments and had concluded that:

a. The Wartsila diesel generators MG-1 and MG-3 through MG-5 are subject to PSD, including BACT, because these generators are part of the production rate increase project since the preliminary draft PSD permit would remove the existing operating restriction on these generators.

b. Based on ADEC's preliminary Technical Report that accompanied the preliminary draft PSD permit, SCR is BACT for the Wartsila diesel generators MG-1, MG-3, MG-4, MG-5, and MG-17.

40. On September 3, 1999, ADEC provided to EPA a final draft permit No. 9932-AC005 for the Cominco Red Dog mine facility. The final draft permit was accompanied by a Final Technical Analysis Report (Final Technical Report) and Response to Comment document.

41. The Final Technical Report concluded that an emission rate achievable with low NOx controls to be BACT on Wartsila diesel generators MG-5 and MG-17. The final draft PSD permit includes an emission rate limit of 121.3 lb/hour on MG-5 and MG-17 based on low NOx controls.

42. The final draft PSD permit does not require the installation of BACT on MG-1, MG-3, and MG-4, but instead only proposes to reinstate the same limit on total annual emissions from MG-1, MG-3, and MG-4 which previously applied to total annual emissions from MG-1 through MG-5. This limit is listed in the final draft PSD permit as:

(1) 2259 tons NOx/year from MG-1, MG-3, and MG-4; and

(2) 750 ppm NOx corrected to 7% oxygen from each unit.

43. Neither the Final Technical Report nor the final draft PSD permit clearly identify or delineate the ambient air boundary for the Cominco Red Dog mine facility.

44. The Public Control Access Plan in final draft PSD permit Section 19 provides that public access to the mine site ambient air boundary is limited by sign postings placed along corridors of potential public access, specifically, at the main entrance to the operation on the southern boundary along the haul road, along Red Dog Creek, and at three sites around the boundary where the terrain may possibly accommodate public access.

45. On September 15, 1999, EPA notified ADEC by letter that the final draft PSD permit was deficient and that issuance of the permit as proposed in the September 3,1999, final draft PSD permit would not comply with the Clean Air Act or the Alaska SIP requirements relating to the construction or modification of new sources or modification of existing sources, if issued as drafted.

IV. FINDING OF NONCOMPLIANCE

46. Based on investigation and analysis of all relevant facts and documentation provided by Cominco and ADEC, pursuant to Section 113(a)(5) of the Clean Air Act, 42 U.S.C. § 7413(a)(5), EPA finds that:

a. The April 2, 1996, ADEC authorization of Cominco's construction and installation of new equipment, including the new gyratory crusher, at the Red Dog mine facility prior to Cominco's receipt of a PSD permit allowing construction of such equipment did not comply with the requirements or prohibitions of the Clean Air Act and/or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

b. Neither the preliminary draft PSD permit nor the final draft PSD permit complies with the requirements or prohibitions of the Clean Air Act or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources. Furthermore, issuance of a final PSD permit as proposed in the preliminary draft PSD permit or final draft PSD permit would not be in compliance with requirements or prohibitions of the Clean Air Act and/or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

c. The construction or major modification of the Red Dog mine facility without a valid PSD permit violates Section 165(a) of the Act, 42 U.S.C. § 7475(a). Consequently, the issuance of this Order, pursuant to Section 167 of the Act, 42 U.S.C. § 7477, is necessary to prevent any further construction or modification at the Red Dog mine facility.

V. ORDER

47. Based on investigation and analysis of all relevant facts, including any good faith efforts to comply, and pursuant to Section 167 of the Act, 42 U.S.C. § 7477, effective immediately upon issuance:

a. ADEC is prohibited from issuing a PSD permit to Cominco's Red Dog mine facility allowing the construction or modification of the facility and designating low NOx controls (or less effective controls) as BACT for Wartsila diesel generator MG-17, unless ADEC satisfactorily documents why SCR is not BACT for the Wartsila diesel generator at the Red Dog mine facility, or ADEC has demonstrated that the PSD permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources. In either case, ADEC must first obtain EPA's written concurrence on this determination.

b. Prior to issuance of a PSD permit to Cominco for Wartsila diesel generators MG-1, MG-3, MG-4, or MG-5,

ADEC is ordered to either include emission limits for MG-1, MG-3, MG-4, and MG-5 that reflect the previous "bubble" limits and result in no increase in actual or allowable emissions from these engines, include NOx emission limits based on SCR, or satisfactorily document why SCR is not BACT for the Wartsila diesel generators at the Red Dog mine facility and to obtain EPA's written concurrence of this determination.

c. In the event ADEC has already issued or released the permit, ADEC is ordered to retract or render it ineffective until such time as EPA provides written concurrence that the permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

48. Such documentation shall be submitted by certified mail with return receipt requested to:

Douglas E. Hardesty
Office of Air Quality
U.S. Environmental Protection Agency
1200 Sixth Ave, OAQ-107
Seattle, WA 98101

Issued this 10 day of Dec, 1999.

/s/
Chuck Clarke
Regional Administrator
Region 10

APPENDIX E

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Cominco Alaska, Inc.,	)	Docket No. CAA-10-2000-0035
Proceeding under Sections 113(a)(5) and 167 of the Clean Air Act.	)	ADMINISTRATIVE ORDER (42 U.S.C. §§ 7413(a)(5) and 7477)

I. ADMINISTRATIVE ORDER

1. This Administrative Order is issued by the Regional Administrator, Region 10, United States Environmental Protection Agency (EPA), to Cominco Alaska, Inc., (Cominco) pursuant to Sections 113(a)(5) and 167 of the Clean Air Act (CAA or Act), 42 U.S.C. §§ 7413(a)(5) and 7477.

2. The authority of the Administrator of EPA to issue orders pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, has been delegated to the Regional Administrator. The Regional Administrator consulted with the Assistant Administrator for the Office of Enforcement and Compliance Assurance or his designee pursuant to the delegation of authority from the Administrator prior to issuing this Administrative Order.

II. STATUTORY AND REGULATORY AUTHORITY

3. The Administrator of EPA, pursuant to Section 109 of the Act, 42 U.S.C. § 7409, promulgated National Primary and Secondary Ambient Air Quality Standards (NAAQS) for certain criteria pollutants, including nitrogen dioxide (NO2). 40 C.F.R. §§ 50.4 to 50.12.

4. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgates lists of attainment status designations for each air quality control region (AQCR) in every State. These lists contain the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the Alaska AQCRs appear at 40 C.F.R. § 81.302.

5. Cominco Alaska, Inc. (Cominco) owns and operates the Red Dog mine facility, a surface zinc and lead ore mining operation, which is located in the Northern Alaska Interstate AQCR which has been designated as in attainment or unclassifiable with respect to the NAAQS. 40 C.F.R. § 81.302.

6. Part C of the Act, 42 U.S.C. §§ 7470-7492, requires the Administrator to promulgate regulations for prevention of significant deterioration (PSD) of air quality in areas designated in accordance with Section 107(d) of the Act, 42 U.S.C. § 7407(d), as in attainment or unclassifiable.

7. Pursuant to Sections 110 and 165(e)(3) of the Act, 42 U.S.C. §§ 7410 and 7471(e)(3), EPA promulgated two sets of largely identical regulations for preventing the significant deterioration of air quality in areas where the existing air quality is better than the ambient standards. In States without a PSD program and in those States where EPA has delegated authority to administer the federal PSD program to the State, the federal PSD regulations at 40 C.F.R. § 51.21 have been incorporated into the various State Implementation Plans (SIPs) of such States. In the remaining States, EPA has approved, as part of the SIP, a State PSD program as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R. § 51.166.

8. EPA has approved 18 AAC 50.020, 50.021, 50.300, 50.400, 50.510, 50.520, 50.530, 50.600, 50.620, and 50.900, as in effect on June 2, 1988, as a revision to the Alaska SIP and as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R. § 51.166 for preventing the significant deterioration of air quality. See 40 C.F.R. § 52.96(a). (48 Fed. Reg. 30626, July 5, 1983, and subsequent amendments.) References in this document to Alaska

statutory or regulatory provisions are to the current SIP-approved versions of the statute or regulation.

9. Section 165 of the Act, 42 U.S.C. § 7475, prohibits the construction of a major emitting facility in any area subject to the requirements of Part C of the Act and the PSD regulations unless, among other things, a permit has been issued for the proposed facility in accordance with Part C of the Act which sets forth emission limitations that conform to the requirements of Part C, and the proposed facility is subject to best available control technology (BACT) for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

10. "Actual emissions" as defined in 18 AAC 50.900(l)(1991) means "for each air contaminant, the average rate in tons per year that a facility actually emitted during the most recent two years of normal operation; the department will, in its discretion, consider facility-specific allowable emissions to be actual emissions of an air contaminant."

11. "Construct" as defined in 18 AAC 50.900(13)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

12. "Allowable emissions" as defined in 18 AAC 50.900(4)(1991) means "the calculated emission rate of a source or facility using the maximum rated capacity and enforceable limitations and conditions on emissions and operations."

13. "Modify" as defined in 18 AAC 50.900(28)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

14. "Best available control technology" is defined in 18 AAC 50.900(9)(1991) as an emission limitation which represents the maximum reduction achievable for each regulated air pollutant taking into account energy, environmental, and economic impact, and other costs.

15. 18 AAC 50.300(a)(1991) states that no person may construct, modify, reconstruct, operate, or cause the operation of a facility meeting the criteria in that subsection without a permit from the State of Alaska Department of Environmental Conservation (ADEC). The list of facilities covered by 18 AAC 50.300(a) includes a facility which has allowable emissions of more than 250 tons per year of a regulated air contaminant and which is modified after August 7, 1980, or after the date of the most recent permit issued to the facility under 18 AAC 50.400(c)(3), causing an increase in actual emissions equal to or exceeding any of the thresholds identified in that subsection.

16. A permit application for a facility subject to 18 AAC 50.300(a)(5) or (6) must include, among other things, a detailed demonstration that the expected maximum emissions from the facility will not cause or contribute to a violation of an ambient air standard or allowable increment in 18 AAC 50.020(b).

17. 18 AAC 50.400(c)(3)(A)(1991) states that ADEC will issue a permit only if the applicant shows that, for a facility subject to 18 AAC 50.300(a)(5) or (6), BACT for controlling emissions of each regulated pollutant will be installed for each new or modified source.

18. Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources, the Administrator may—
>
> (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;
>
> (B) issue an administrative penalty order in accordance with subsection (d) of this section; or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

19. Section 167 of the Act, 42 U.S.C. § 7477, provides that the Administrator shall take such measures, including issuance of an order, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of Part C of the Act.

20. Section 169(1) of the Act, 42 U.S.C. § 7479(1), defines a major emitting facility, in pertinent part, as a stationary source which emits or has the potential to emit 250 tons per year or more of any air pollutant.

21. A State does not conform to the requirements of Part C of the Act if, among other things, it allows a major emitting facility to commence construction or modification prior to receipt of a PSD permit or issues a PSD permit to a facility without subjecting the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

22. A major emitting facility does not conform to the requirements of Part C if, among other things, it commences construction or modification prior to receipt of a PSD permit that subjects the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

III. FINDINGS OF FACT

23. On June 17, 1988, ADEC issued a PSD permit, Permit No. 8732-AA001, that authorized the construction of the Red Dog mine facility, including the installation of five Wartsila diesel generators (MG-1, MG-2, MG-3, MG-4, and MG-5).

24. ADEC revised and replaced the June 1988 PSD permit on several occasions, including a revision dated July 27, 1994, Permit No. 9332-AA003, which: (a) removed from the

permit a NOx BACT limit of 750 parts per million volume dried (ppmvd) that applied to the five Wartsila diesel generators, and substituted a limit of 109,660,000 kilowatt hours per continuous 365-day period (kW-hr/yr) for MG-1, MG-3, MG-4, and MG-5, (b) removed the stand-by limits on MG-2 and permitted it to operate full-time, and (c) authorized the installation and full-time operation of a sixth Wartsila diesel generator (MG-6).

25. On March 27, 1996, prior to receiving an amended PSD permit, Cominco requested that ADEC allow Cominco to make on-site preparations for changes to the facility that would allow for production increases. On April 2, 1996, ADEC granted Cominco a waiver to allow the company to conduct specified procurement and construction activities on the condition that Cominco prepare and submit a request for a permit amendment concurrent with the activities.

26. Between April 1996 and May 1998, Cominco constructed a new gyratory crusher at the Red Dog mine facility without authorization under a valid PSD permit.

27. On June 29, 1998, Cominco submitted a PSD permit application to ADEC for what it referred to as a "production rate increase project" that was expected to increase the mine's ore processing rate from approximately 2,200,000 tons per year to 3,500,000 tons per year and to increase the production of zinc and lead concentrate from 854,000 tons per year to 1,400,000 tons per year. Cominco submitted a supplement to the application to ADEC on April 6, 1999. As part of the production rate increase project, Cominco requested that ADEC, among other things, remove the air quality operating restrictions on the four Wartsila diesel generators that were installed in 1988 and which still had operational limits on them (MG-1, MG-3, MG-4, MG-5), "add" a seventh Wartsila diesel generator (MG-17), "add" the new gyratory crusher that Cominco had already installed, and approve the addition of other equipment and changes necessary to support the production rate increase project.

28. On May 4, 1999, ADEC issued a preliminary PSD permit (preliminary draft PSD permit) for the production rate

increase project for review and public comment. The preliminary draft PSD permit proposed to remove the operational cap of 109,660,000 kW-hr/year that applied to Wartsila diesel generators MG-1, MG-3, MG-4, and MG-5, to "add" the seventh Wartsila diesel generator (MG-17), to "add" the new gyrator crusher, and to approve the addition of other equipment and changes that Cominco requested in its PSD permit application for the production rate increase project.

29. ADEC prepared a preliminary technical analysis report (Preliminary Technical Report) to accompany the preliminary draft PSD permit. The Preliminary Technical Report stated that the production rate increase project is expected to increase actual NOx emissions by up to 1,100 tons per year; carbon monoxide (CO) emissions by 90 tons per year; particulate matter (PM) emissions by 35 tons per year; PM emissions less than 10 micrometers in diameter (PM-10) by 35 tons per year; volatile organic compound (VOC) emissions by 59 tons per year; and lead (Pb) emissions by 0.046 tons per year. The proposed production rate increase project is expected to reduce sulfur dioxide (SO2) emissions by 37 tons per year.

30. In the preliminary draft PSD permit and Preliminary Technical Report, ADEC concluded that of the seven Wartsila diesel generators, only MG-5 and MG-17 were subject to PSD requirements and therefore required BACT. EPA regulations require that technical and economic feasibility be considered when determining BACT. In the Preliminary Technical Report ADEC determined that Selective Catalytic Reduction (SCR) is a technically and economically feasible emission control technology for the Wartsila generators and that SCR could result in reductions of 712 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report also concluded that installation of low NOx controls would result in reductions of only 273 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report then concluded that BACT for MG-5 and MG-17 was an emission limit based on low NOx controls.

31. The Red Dog mine facility was at the time of construction and continues to be a "major emitting facility" under Section 169(1) of the Act, 42 U.S.C. § 7479(1).

32. The Red Dog mine facility was at the time of construction and continues to be a facility with allowable emissions, as defined in 18 AAC 50.900(4), of at least 250 tons per year of a regulated air contaminant. The Red Dog mine facility is therefore a "facility," as that term is defined in 18 AAC 50.300(a)(6).

33. The production rate increase project will "modify," as that term is defined in 18 AAC 50.900(28), the Red Dog mine facility.

34. The production rate increase project will increase actual emissions of NOx, PM, PM-10, and VOC from the Red Dog mine facility by more than the thresholds identified in 18 AAC 50.300(a)(6)(C) and will occur after 1980 and after the date of the most recent valid permit issued for the Red Dog mine under 18 AAC 50.400(c)(3). Therefore the Red Dog mine facility is a "facility," as listed in 18 AAC 50.300(a)(6)(C).

35. The public comment period on the preliminary draft PSD permit for the production rate increase project ended on June 2, 1999.

36. On June 2, 1999, the United States Department of the Interior, National Park Service (NPS), submitted comments on the preliminary draft PSD permit for the production rate increase project. The NPS comments raised several concerns with the preliminary draft PSD permit, including the following:

a. ADEC failed to subject four of the Wartsila diesel generators (MG-1 and MG-3 through MG-5) to PSD, including BACT. These generators are part of the production rate increase project because the preliminary draft PSD permit would remove an operating restriction on these generators.

b. ADEC failed to require SCR on the two Wartsila diesel generators which ADEC acknowledged are subject to

BACT (MG-5 and MG-17). SCR is BACT for the Wartsila diesel generators.

37. By letter dated July 29, 1999, EPA informed ADEC that it agreed with NPS's comments and had concluded that:

a. The Wartsila diesel generators MG-1 and MG-3 through MG-5 are subject to PSD, including BACT, because these generators are part of the production rate increase project since the preliminary draft PSD permit would remove the existing operating restriction on these generators.

b. Based on ADEC's preliminary Technical Report that accompanied the preliminary draft PSD permit, SCR is BACT for the Wartsila diesel generators MG-1, MG-3, MG-4, MG-5, and MG-17.

38. On September 3, 1999, ADEC provided to EPA a final draft permit No. 9932-AC005 for the Cominco Red Dog mine facility. The final draft permit was accompanied by a Final Technical Analysis Report (Final Technical Report) and Response to Comment document.

39. The Final Technical Report concluded that an emission rate achievable with low NOx controls to be BACT on Wartsila diesel generators MG-5 and MG-17. The final draft PSD permit included an emission rate limit of 121.3 lb/hour on MG-5 and MG-17 based on low NOx controls.

40. The final draft PSD permit did not require the installation of BACT on MG-1, MG-3, and MG-4, but instead only proposed to reinstate the same limit on total annual emissions from MG-1, MG-3, and MG-4 which previously applied to total annual emissions from MG-1 through MG-5. This limit was listed in the final draft PSD permit as:

(1) 2259 tons NOx/year from MG-1, MG-3, and MG-4; and

(2) 750 ppm NOx corrected to 7% oxygen from each unit.

41. On September 15, 1999, EPA notified ADEC by letter that the final draft PSD permit was deficient and that issu-

ance of the permit as proposed in the September 3, 1999, final draft PSD permit would not comply with the Clean Air Act or the Alaska SIP requirements relating to the construction or modification of new sources or modification of existing sources, if issued as drafted. Additional letters were sent to ADEC on September 28, 1999, and November 10, 1999, further explaining EPA's concerns with the final draft permit.

42. On December 10, 1999, pursuant to the authority of Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, EPA issued a Finding of Noncompliance and Order, Docket No. CAA-10-99-0263, to ADEC (ADEC 113/167 Order). On the same day, the ADEC 113/167 Order was sent by fax and overnight certified mail return receipt requested to Michele Brown, ADEC Commissioner, and faxed to Tom Chapple, ADEC, Director, Division of Air and Water Quality. A copy of the ADEC 113/167 Order was faxed to Doug Horswill, Vice President for Environmental and Corporate Affairs, Cominco, and sent overnight certified mail return receipt requested to John Keys, General Manager, Cominco.

43. The ADEC 113/167 Order provides at paragraph 46a that:

> The April 2, 1996, ADEC authorization of Cominco's construction and installation of new equipment, including the new gyratory crusher, at the Red Dog mine facility prior to Cominco's receipt of a PSD permit allowing construction of such equipment did not comply with the requirements or prohibitions of the Clean Air Act and/or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

44. The ADEC 113/167 Order provides, in part, at paragraph 47 that "effective immediately upon issuance:

a. ADEC is prohibited from issuing a PSD permit to Cominco's Red Dog mine facility allowing the construction or modification of the facility and designating low NOx

controls (or less effective controls) as BACT for Wartsila diesel generator MG-17, unless ADEC satisfactorily documents why SCR is not BACT for the Wartsila diesel generator at the Red Dog mine facility, or ADEC has demonstrated that the PSD permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources. In either case, ADEC must first obtain EPA's written concurrence on this determination.

* * *

c. In the event ADEC has already issued or released the permit, ADEC is ordered to retract or render it ineffective until such time as EPA provides written concurrence that the permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

45. Shortly after receiving the ADEC 113/167 Order, ADEC issued Air Quality Construction Permit No. 9932-AC005 for the Cominco Red Dog Mine on December 10, 1999 (final permit). The final permit was accompanied by a Final Technical Analysis Report dated December 10, 1999 (12/10/99 Technical Report).

46. The 12/10/99 Technical Report states at page 49 that "The Department [ADEC] finds an emission limit achievable with low NOx controls to be BACT on diesel generator MG-17. A vendor-guaranteed emission rate of 121.3 lb/hour is representative of the NOx reduction expected of the Low NOx controls selected as BACT."

47. Section 4, Best Available Control Technology (BACT) for Oxides of Nitrogen (NOx), Condition 20.1 of the final permit requires Wartsila diesel generator MG-17 to limit NOx emissions to no greater than 121.3 lb/hour averaged over any three hours.

48. On February 8, 2000, EPA notified ADEC pursuant to Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) that Permit No. 9932-AC005, issued to Cominco on December 10, 1999, fails to comply with Pact C of the Act, 42 U.S.C. § 7470-7492, the implementing regulations and Alaska SIP, and that the State is not in compliance with Part C of the Act.

49. The issuance of this Order, pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, is necessary to prevent any further construction or modification at the Red Dog mine facility.

V. ORDER

50. Based on investigation and analysis of relevant facts, and pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477:

a. Cominco is prohibited from commencing any and all construction or modification activities at the Red Dog mine facility associated with the Wartsila diesel generator MG-17 until Cominco has demonstrated to EPA's satisfaction compliance with Part C of the Act and 40 C.F.R. Part 51, and obtains a valid PSD permit from ADEC for the Wartsila generator MG-17 that complies with the Act and with the December 10, 1999 Finding and Order.

b. Cominco is specifically allowed to continue construction or operation of other portions of the Red Dog mine facility as authorized by ADEC Permit No. 9932-AC005.

c. Cominco shall submit, no later than five (5) days after the effective date of this Order, certification that Cominco has complied with the prohibition in the paragraph 50a above and will continue to comply with paragraph 50a of this Order will Cominco demonstrates to EPA's satisfaction compliance with Part C of the Act and 40 C.F.R. Part 51, Subpart I and the Alaska SIP. Such certification shall be submitted by certified mail with return receipt requested to:

Douglas E. Hardesty
Office of Air Quality
U.S. Environmental Protection Agency
1200 Sixth Ave, OAQ-107
Seattle, WA 98101

50. Cominco has the opportunity to confer with EPA concerning this Order. Any request for a conference should be made to Mr. Hardesty, Chief, Federal and Delegated Air Programs Unit, within 10 days of issuance of this Order. He may be reached at (206) 553-6641. Such a conference shall occur no later than March 16, 2000.

Issued this 8th day of Feb., 2000.

/s/
Chuck Findley
Deputy Regional Administrator

APPENDIX F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	AMENDED
Cominco Alaska, Inc.,	)	ADMINISTRATIVE ORDER
	)	
Proceeding under Sections	)	Docket No. CAA-10-2000-0035
113(a)(5) and 167 of the	)	
Clean Air Act.	)	(42 U.S.C. §§ 7413(a)(5)
	)	and 7477)

I. AMENDED ADMINISTRATIVE ORDER

1. This Amended Administrative Order is issued by the Regional Administrator, Region 10, United States Environmental Protection Agency (EPA), to Cominco Alaska, Inc., (Cominco) pursuant to Sections 113(a)(5) and 167 of the Clean Air Act (CAA or Act), 42 U.S.C. §§ 7413(a)(5) and 7477.

2. The authority of the Administrator of EPA to issue orders pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, has been delegated to the Regional Administrator. The Regional Administrator consulted with the Assistant Administrator for the Office of Enforcement and Compliance Assurance or his designee pursuant to the delegation of authority from the Administrator prior to issuing this Amended Administrative Order.

II. STATUTORY AND REGULATORY AUTHORITY

3. The Administrator of EPA, pursuant to Section 109 of the Act, 42 U.S.C. § 7409, promulgated National Primary and Secondary Ambient Air Quality Standards (NAAQS) for certain criteria pollutants, including nitrogen dioxide (NO2). 40 C.F.R. §§ 50.4 to 50.12.

4. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgates lists of attainment status designations for each quality control region (AQCR) in every State. These lists contain the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the Alaska AQCRs appear at 40 C.F.R. § 81.302.

5. Cominco Alaska, Inc. (Cominco) owns and operates the Red Dog mine facility, a surface zinc and lead ore mining operation, which is located in the Northern Alaska Interstate AQCR which has been designated as in attainment or unclassifiable with respect to the NAAQS. 40 C.F.R § 81.302.

6. Part C of the Act, 42 U.S.C. §§ 7470-7492, requires the Administrator to promulgate regulations for prevention of significant deterioration (PSD) of air quality in areas designated in accordance with Section 107(d) of the Act, 42 U.S.C. § 7407(d), as in attainment or unclassifiable.

7. Pursuant to Sections 110 and 165(e)(3) of the Act, 42 U.S.C. §§ 7410 and 7471(e)(3), EPA promulgated two sets of largely identical regulations for preventing the significant deterioration of air quality in areas where the existing air quality is better than the ambient standards. In States without a PSD program and in those States where EPA has delegated authority to administer the federal PSD program to the State, the federal PSD regulations at 40 C.F.R. § 51.21 have been incorporated into the various State Implementation Plans (SIPs) of such States. In the remaining States, EPA has approved, as part of the SIP, a State PSD program as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R. § 51.166.

8. EPA has approved 18 AAC 50.020, 50.021, 50.300, 50.400, 50.510, 50.520, 50.530, 50.600, 50.620, and 50.900, as in effect on June 2, 1988, as a revision to the Alaska SIP and as meeting the requirements of Part C of the Act and the PSD regulations at 40 C.F.R. § 51.166 for preventing the significant deterioration of air quality. See 40 C.F.R § 52.96(a). (48 Fed. Reg. 30626, July 5, 1983, and subsequent amendments.) References in this document to Alaska statutory or regulatory provisions are to the current SIP-approved versions of the statute or regulation.

9. Section 165 of the Act, 42 U.S.C. § 7475, prohibits the construction of a major emitting facility in any area subject to the requirements of Part C of the Act and the PSD regulations unless, among other things, a permit has been issued for the proposed facility in accordance with Part C of the Act which sets forth emission limitations that conform to the requirements of Part C, and the proposed facility is subject to best available control technology (BACT) for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

10. "Actual emissions" as defined in 18 AAC 50.900(1)(1991) means "for each air contaminant, the average rate in tons per year that a facility actually emitted during the most recent two years of normal operation; the department will, in its discretion, consider facility-specific allowable emissions to be actual emissions of an air contaminant."

11. "Construct" as defined in 18 AAC 50.900(13)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

12. "Allowable emissions" as defined in 18 AAC 50.900(4)(1991) means "the calculated emission rate of a source or facility using the maximum rated capacity and enforceable limitations and conditions on emissions and operations."

13. "Modify" as defined in 18 AAC 50.900(28)(1991) means "to make a change or a series of changes in operation or any physical changes or additions to a source which increase the actual emissions of an air pollutant."

14. "Best available control technology" is defined in 18 AAC 50.900(9)(1991) as an emission limitation which represents the maximum reduction achievable for each regulated air pollutant taking into account energy, environmental, and economic impacts, and other costs.

15. 18 AAC 50.300(a)(1991) states that no person may construct, modify, reconstruct, operate, or cause the operation of a facility meeting the criteria in that subsection without a permit from the State of Alaska, Department of Environmental Conservation (ADEC). The list of facilities covered by 18 AAC 50.300(a) includes a facility which has allowable emissions of more than 250 tons per year of a regulated air contaminant and which is modified after August 7, 1980, or after the date of the most recent permit issued to the facility under 18 AAC 50.400(c)(3), causing an increase in actual emissions equal to or exceeding any of the thresholds identified in that subsection.

16. A permit application for a facility subject to 18 AAC 50.300(a)(5) or (6) must include, among other things, a detailed demonstration that the expected maximum emissions from the facility will not cause or contribute to a violation of an ambient air standard or allowable increment in 18 AAC 50.020(b).

17. 18 AAC 50.400(c)(3)(A)(1991) states that ADEC will issue a permit only if the applicant shows that, for a facility subject to 18 AAC 50.300(a)(5) or (6), BACT for controlling emissions of each regulated pollutant will be installed for each new or modified source.

18. Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources, the Administrator may—
>
> (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;
>
> (B) issue an administrative penalty order in accordance with subsection (d) of this section; or

> (C) bring a civil action under subsection (b) of this section.
>
> Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

19. Section 167 of the Act, 42 U.S.C. § 7477, provides that the Administrator shall take such measures, including issuance of an order, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of Part C of the Act.

20. Section 169(1) of the Act, 42 U.S.C. § 7479(1), defines a major emitting facility, in pertinent part, as a stationary source which emits or has the potential to emit 250 tons per year or more of any air pollutant.

21. A State does not conform to the requirements of Part C of the Act if, among other things, it allows a major emitting facility to commence construction or modification prior to receipt of a PSD permit or issues a PSD permit to a facility without subjecting the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

22. A major emitting facility does not conform to the requirements of Part C if, among other things, it commences construction or modification prior to receipt of a PSD permit that subjects the facility to BACT for each pollutant subject to regulation under Title I of the Act that is emitted from or which results from such facility.

III. FINDINGS OF FACT

23. On June 17, 1988, ADEC issued a PSD permit, Permit No. 8732-AA001, that authorized the construction of the Red Dog mine facility, including the installation of five Wartsila diesel generators (MG-1, MG-2, MG-3, MG-4, and MG-5).

24. ADEC revised and replaced the June 1988 PSD permit on several occasions, including a revision dated July 27, 1994, Permit No. 9332-AA003, which: (a) removed from the

permit a NOx BACT limit of 750 parts per million volume dried (ppmvd) that applied to the five Wartsila diesel generators, and substituted a limit of 109,660,000 kilowatt hours per continuous 365-day period (kW-hr/yr) for MG-1, MG-3, MG-4, and MG-5, (b) removed the stand-by limits on MG-2 and permitted it to operate full-time, and (c) authorized the installation and full-time operation of a sixth Wartsila diesel generator (MG-6).

25. On March 27, 1996, prior to receiving an amended PSD permit, Cominco requested that ADEC allow Cominco to make on-site preparations for changes to the facility that would allow for production increases. On April 2, 1996, ADEC granted Cominco a waiver to allow the company to conduct specified procurement and construction activities on the condition that Cominco prepare and submit a request for a permit amendment concurrent with the activities.

26. Between April 1996 and May 1998, Cominco constructed a new gyratory crusher at the Red Dog mine facility without authorization under a valid PSD permit.

27. On June 29, 1998, Cominco submitted a PSD permit application to ADEC for what it referred to as a "production rate increase project" that was expected to increase the mine's ore processing rate from approximately 2,200,000 tons per year to 3,500,000 tons per year and to increase the production of zinc and lead concentrate from 854,000 tons per year to 1,400,000 tons per year. Cominco submitted a supplement to the application to ADEC on April 6, 1999. As part of the production rate increase project, Cominco requested that ADEC, among other things, remove the air quality operating restrictions on the four Wartsila diesel generators that were installed in 1988 and which still had operational limits on them (MG-1, MG-3, MG-4, MG-5), "add" a seventh Wartsila diesel generator (MG-17), "add" the new gyratory crusher that Cominco had already installed, and approve the addition of other equipment and changes necessary to support the production rate increase project.

28. On May 4, 1999, ADEC issued a preliminary PSD permit (preliminary draft PSD permit) for the production rate

increase project for review and public comment. The preliminary draft PSD permit proposed to remove the operational cap of 109,660,000 kW-hr/year that applied to Wartsila diesel generators MG-1, MG-3, MG-4, and MG-5, to "add" the seventh Wartsila diesel generator (MG-17), to "add" the new gyrator crusher, and to approve the addition of other equipment and changes that Cominco requested in its PSD permit application for the production rate increase project.

29. ADEC prepared a preliminary technical analysis report (Preliminary Technical Report) to accompany the preliminary draft PSD permit. The Preliminary Technical Report stated that the production rate increase project is expected to increase actual NOx emissions by up to 1,100 tons per year; carbon monoxide (CO) emissions by 90 tons per year; particulate matter (PM) emissions by 35 tons per year; PM emissions less than 10 micrometers in diameter (PM-10) by 35 tons per year; volatile organic compound (VOC) emissions by 59 tons per year; and lead (Pb) emissions by 0.046 tons per year. The proposed production rate increase project is expected to reduce sulfur dioxide (SO2) emissions by 37 tons per year.

30. In the preliminary draft PSD permit and Preliminary Technical Report, ADEC concluded that, of the seven Wartsila diesel generators, only MG-5 and MG-17 were subject to PSD requirements and therefore required BACT. EPA regulations require that technical and economic feasibility be considered when determining BACT. In the Preliminary Technical Report ADEC determined that Selective Catalytic Reduction (SCR) is a technically and economically feasible emission control technology for the Wartsila generators and that SCR could result in reductions of 712 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report also concluded that installation of low NOx controls would result in reductions of only 273 tons per year of NOx for each Wartsila diesel generator. The Preliminary Technical Report then concluded that BACT for MG-5 and MG-17 was an emission limit based on low NOx controls.

31. The Red Dog mine facility was at the time of construction and continues to be a "major emitting facility" under Section 169(1) of the Act, 42 U.S.C. § 7479(1).

32. The Red Dog mine facility was at the time of construction and continues to be a facility with allowable emissions, as defined in 18 AAC 50.900(4), of at least 250 tons per year of a regulated air contaminant. The Red Dog mine facility is therefore a "facility," as that term is defined in 18 AAC 50.300(a)(6).

33. The production rate increase project will "modify," as that term is defined in 18 AAC 50.900(28), the Red Dog mine facility.

34. The production rate increase project will increase actual emissions of NOx, PM, PM-10, and VOC from the Red Dog mine facility by more than the thresholds identified in 18 AAC 50.300(a)(6)(C) and will occur after 1980 and after the date of the most recent valid permit issued for the Red Dog mine under 18 AAC 50.400(c)(3). Therefore the Red Dog mine facility is a "facility," as listed in 18 AAC 50.300(a)(6)(C).

35. The public comment period on the preliminary draft PSD permit for the production rate increase project ended on June 2, 1999.

36. On June 2, 1999, the United States Department of the Interior, National Park Service (NPS), submitted comments on the preliminary draft PSD permit for the production rate increase project. The NPS comments raised several concerns with the preliminary draft PSD permit, including the following:

a. ADEC failed to subject four of the Wartsila diesel generators (MG-1 and MG-3 through MG-5) to PSD, including BACT. These generators are part of the production rate increase project because the preliminary draft PSD permit would remove an operating restriction on these generators.

b. ADEC failed to require SCR on the two Wartsila diesel generators which ADEC acknowledged are subject to

BACT (MG-5 and MG-17). SCR is BACT for the Wartsila diesel generators.

37. By letter dated July 29, 1999, EPA informed ADEC that it agreed with NPS's comments and had concluded that:

a. The Wartsila diesel generators MG-1 and MG-3 through MG-5 are subject to PSD, including BACT, because these generators are part of the production rate increase project since the preliminary draft PSD permit would remove the existing operating restriction on these generators.

b. Based on ADEC's preliminary Technical Report that accompanied the preliminary draft PSD permit, SCR is BACT for the Wartsila diesel generators MG-1, MG-3, MG-4, MG-5, and MG-17.

38. On September 3, 1999, ADEC provided to EPA a final draft permit No. 9932-AC005 for the Cominco Red Dog mine facility. The final draft permit was accompanied by a Final Technical Analysis Report (Final Technical Report) and Response to Comment document.

39. The Final Technical Report concluded that an emission rate achievable with low NOx controls to be BACT on Wartsila diesel generators MG-5 and MG-17. The final draft PSD permit included an emission rate limit of 121.3 lb/hour on MG-5 and MG-17 based on low NOx controls.

40. The final draft PSD permit did not require the installation of BACT on MG-1, MG-3, and MG-4, but instead only proposed to reinstate the same limit on total annual emissions from MG-1, MG-3, and MG-4 which previously applied to total annual emissions from MG-1 through MG-5. This limit was listed in the final draft PSD permit as:

(1) 2259 tons NOx/year from MG-1, MG-3, and MG-4; and

(2) 750 ppm NOx corrected to 7% oxygen from each unit.

41. On September 15, 1999, EPA notified ADEC by letter that the final draft PSD permit was deficient and that issu-

ance of the permit as proposed in the September 3, 1999, final draft PSD permit would not comply with the Clean Air Act or the Alaska SIP requirements relating to the construction or modification of new sources or modification of existing sources, if issued as drafted. Additional letters were sent to ADEC on September 28, 1999, and November 10, 1999, further explaining EPA's concerns with the final draft permit.

42. On December 10, 1999, pursuant to the authority of Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, EPA issued a Finding of Noncompliance and Order, Docket No. CAA-10-99-0263, to ADEC (ADEC 113/167 Order). On the same day, the ADEC 113/167 Order was sent by fax and overnight certified mail return receipt requested to Michele Brown, ADEC Commissioner, and faxed to Tom Chapple, ADEC, Director, Division of Air and Water Quality. A copy of the ADEC 113/167 Order was faxed to Doug Horswill, Vice President for Environmental and Corporate Affairs, Cominco, and sent overnight certified mail return receipt requested to John Keys, General Manager, Cominco.

43. The ADEC 113/167 Order provides at paragraph 46a that:

> The April 2, 1996, ADEC authorization of Cominco's construction and installation of new equipment, including the new gyratory crusher, at the Red Dog mine facility prior to Cominco's receipt of a PSD permit allowing construction of such equipment did not comply with the requirements or prohibitions of the Clean Air Act and/or the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

44. The ADEC 113/167 Order provides, in part, at paragraph 47 that "effective immediately upon issuance:

a. ADEC is prohibited from issuing a PSD permit to Cominco's Red Dog mine facility allowing the construction or modification of the facility and designating low NOx

controls (or less effective controls) as BACT for Wartsila diesel generator MG-17, unless ADEC satisfactorily documents why SCR is not BACT for the Wartsila diesel generator at the Red Dog mine faciiity, or ADEC has demonstrated that the PSD permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources. In either case, ADEC must first obtain EPA's written concurrence on this determination.

* * *

c. In the event ADEC has already issued or released the permit, ADEC is ordered to retract or render it ineffective until such time as EPA provides written concurrence that the permit is in compliance with the prevention of significant deterioration provisions of Part C of the Act, 42 U.S.C. §§ 7470-7492, and the Alaska SIP relating to the construction or modification of new sources or the modification of existing sources.

45. Shortly after receiving the ADEC 113/167 Order, ADEC issued Air Quality Construction Permit No. 9932-AC005 for the Cominco Red Dog Mine on December 10, 1999 (final permit). The final permit was accompanied by a Final Technical Analysis Report dated December 10, 1999 (12/10/99 Technical Report).

46. The 12/10/99 Technical Report states at page 49 that "The Department [ADEC] finds an emission limit achievable with low NOx controls to be BACT on diesel generator MG-17. A vendor-guaranteed emission rate of 121.3 lb/hour is representative of the NOx reduction expected of the Low NOx controls selected as BACT."

47. Section 4, Best Available Control Technology (BACT) for Oxides of Nitrogen (NOx), Condition 20.1 of the final permit requires Wartsila diesel generator MG-17 to limit NOx emissions to no greater than 121.3 lb/hour averaged over any three hours.

48. On February 8, 2000, EPA notified ADEC pursuant to Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) that Permit No. 9932-AC005, issued to Cominco on December 10, 1999, fails to comply with Part C of the Act, 42 U.S.C. § 7470-7492, the implementing regulations and Alaska SIP, and that the State is not in compliance with Part C of the Act. Cominco received a copy of the notification by fax on February 8, 2000, and by certified mail on February 16, 2000.

49. On February 8, 2000, pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. § 7413(a)(5) and 7477, EPA issued an Administrative Order to Cominco prohibiting the construction of MG-17 prior to receipt of a valid PSD permit. Cominco received a copy of the Order by fax on February 8, 2000 and by certified mail on February 10, 2000.

50. On February 16, 2000, Cominco requested that EPA stay the December 10, 1999 Order to ADEC and the February 8, 2000 Order to Cominco.

51. The issuance of this Amended Order, pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, is necessary to prevent specified further construction or modification at the Red Dog mine facility.

IV. AMENDED ORDER

52. Based on investigation and analysis of relevant facts, and pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477:

a. With exception of the activities specified below, Cominco is prohibited from commencing construction or modification activities at the Red Dog mine facility associated with the Wartsila diesel generator MG-17 until Cominco has demonstrated to EPA's satisfaction compliance with Part C of the Act and 40 C.F.R. Part 51, and obtains a valid PSD permit from ADEC for the Wartsila generator MG-17 that complies with the Act and with the December 10, 1999 Finding and Order. Cominco may conduct the following:

(i) order, purchase and fabricate the Wartsila generator, MG-17 and the equipment necessary to install and operate it;

(ii) design, order, purchase and fabricate the equipment necessary to install and operate SCR;

(iii) design and erect the MG-17 module;

(iv) install MG-17 in the module;

(v) transport module and the associated equipment to the Red Dog mine site;

(vi) transport SCR and the associated equipment to the Red Dog mine site;

(vii) conduct ground excavation necessary for the module and MG-17;

(viii) conduct ground excavation necessary for SCR;

(ix) pour concrete foundations necessary for MG-17;

(x) pour concrete foundations necessary for SCR; and

(xi) conduct other weather-limited activities with advance approval of EPA.

b. Cominco is specifically allowed to continue construction or operation of other portions of the Red Dog mine facility as authorized by ADEC Permit No. 9932-AC005.

c. Cominco shall submit, no later than five (5) days after the effective date of this Order, certification that Cominco has complied with the prohibition in the paragraph 52a above and will continue to comply with paragraph 52a of this Order until Cominco demonstrates to EPA's satisfaction compliance with Part C of the Act and 40 C.F.R. Part 51, Subpart I and the Alaska SIP. Such certification shall be submitted by certified mail with return receipt requested to:

Douglas Hardesty
Office of Air Quality
U.S. Environmental Protection Agency
1200 Sixth Ave, OAQ-107
Seattle, WA 98101

53. Cominco has the opportunity to confer with EPA concerning this Amended Order. Any request for a conference should be made to Mr. Hardesty, Manager, Federal and Delegated Air Programs Unit, within 5 days of issuance of this Order. He may be reached at (206) 553-6641. Such a conference shall occur no later than March 23, 2000. An Order issued under Section 113 of the CAA shall not take effect until the person to whom it is issued has the opportunity to confer with the EPA. This Amended Order is effective March 24, 2000.

54. This Amended Order specifically supercedes and vacates the Administrative Order issued to Cominco on February 8, 2000.

Issued this 7th day of March, 2000.

/s/
Chuck Findley
Deputy Regional Administrator

Supreme Court, U.S.
FILED
NOV 20 2002
OFFICE OF THE CLERK

No. 02-658

IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

TECK COMINCO ALASKA INCORPORATED'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LAWRENCE L. HARTIG
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* Counsel of Record

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Teck Cominco Alaska Incorporated ("Teck Cominco") was a petitioner in the Ninth Circuit below and is a respondent in this case. Teck Cominco is a wholly-owned subsidiary of Teck Cominco American Incorporated, which is wholly owned by Cominco Mining Worldwide Holdings, Ltd., which is wholly owned by Cominco Mining Partnership, a partnership of Teck Cominco Metals, Ltd. and Teck Cominco Nova Scotia, Ltd. Teck Cominco Nova Scotia, Ltd. is wholly owned by Teck Cominco Metals, Ltd., which is wholly owned by Teck Cominco Limited, a publicly held company.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

TECK COMINCO ALASKA INCORPORATED'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 12.6, respondent Teck Cominco Alaska Incorporated ("Teck Cominco") respectfully submits this response in support of the State of Alaska's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit below. Teck Cominco operates the Red Dog Mine, the world's largest source of zinc concentrate, in Northwest Alaska on lands owned by the NANA Regional Corporation, a regional Native corporation established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq*. Along with petitioner State of

Alaska, Teck Cominco sought review in the Ninth Circuit of the EPA's orders in this case.

The question presented is of national significance and should be resolved by this Court. Under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, no "major emitting facility" may be constructed or modified in any "clean air" area unless the facility is subject to the "best available control technology," or "BACT." 42 U.S.C. § 7475(a)(4). BACT is defined as "an emission limitation * * * which *the permitting authority*, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *." *Id.* § 7479(3) (emphasis added). In Alaska—as in most States—the "permitting authority" under the Act is the State.

Accordingly, when Teck Cominco decided to modify its facilities to increase production at the Red Dog Mine, Teck Cominco sought permission from the State of Alaska, which subsequently issued a permit designating a certain technology—"Low NOx"—as BACT for a new generator that Teck Cominco planned to build, the MG-17 generator. The EPA disagreed with the State's BACT determination for the MG-17 generator, however, and issued a series of enforcement orders blocking its construction unless Teck Cominco used a different technology—SCR—that the EPA considered BACT.

The question presented here—whether it is the States or the federal government that has been delegated the authority to make BACT and similar other permitting decisions under the CAA—affects thousands of regulated entities nationwide. Like Teck Cominco, those entities need to know who has that authority. Under the Ninth Circuit's decision, there is nothing to prevent the EPA from invalidating a State's BACT determination long after a permit has been issued and a company has invested heavily in costly technology. Moreover, until the issue is finally resolved by this Court,

regulated entities will continue to encounter administrative delays and incur unnecessary costs in the permitting process. In this case, for example, Teck Cominco spent more than a year working with the State of Alaska to gain approval of its permit application. As a direct result of the Ninth Circuit's decision, however, Teck Cominco is now engaged in cooperative discussions with the EPA to resolve permitting issues and allow for immediate construction and operation of the MG-17 generator. Congress plainly did not intend such a cumbersome review process. *See* S. Rep. No. 95-127, at 32 (1977). This Court's guidance on the jurisdictional allocation between the States and the federal government under this system of "cooperative federalism" is needed.

CONCLUSION

For the foregoing reasons, and those in the State of Alaska's petition for a writ of certiorari, the petition should be granted and the Ninth Circuit's judgment reversed.

Respectfully submitted,

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In the Supreme Court of the United States

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Sections 113(a)(5) and 167 of the Clean Air Act, 42 U.S.C. 7413(a)(5) and 7477, authorize the Environmental Protection Agency to issue administrative orders to prevent construction of a major emitting facility where a state permitting authority is prepared to grant the facility operator a "prevention-of-significant-deterioration" air quality permit based on an arbitrary and capricious application of the statutory requirement that such sources of air pollution be subject to the best available control technology.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 298 F.3d 814. A prior order of the court of appeals addressing its subject matter jurisdiction (Pet. App. 17a-23a) is reported at 244 F.3d 748.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. The petition for a writ of certiorari was filed on October 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 113(a)(5) of the Clean Air Act (CAA or the Act), 42 U.S.C. 7413(a)(5), provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—
>
> (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;
>
> (B) issue an administrative penalty order in accordance with subsection (d) of this section, or
>
> (C) bring a civil action under subsection (b) of this section.
>
> Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

Section 167 of the CAA, 42 U.S.C. 7477, provides:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not

> subject to an implementation plan which meets the requirements of this part.

STATEMENT

Petitioner seeks review of a decision of the court of appeals arising from three administrative orders of the Environmental Protection Agency (EPA) issued under the CAA. Petitions for review were filed challenging, among other things, EPA's statutory authority to issue the orders. The court of appeals denied the petitions, upholding EPA's invocation and exercise of authority under Sections 113(a)(5) and 167 of the CAA, 42 U.S.C. 7413(a)(5) and 42 U.S.C. 7477.

1. The Clean Air Act establishes a comprehensive program for controlling and improving the nation's air quality. Under it, "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). A prime example of this partnership exists in one of the central features of the Act: national ambient air quality standards (NAAQS). The CAA requires EPA to establish NAAQS for certain air pollutants. 42 U.S.C. 7408-7409; *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 462 (2001). States, in turn, play a "statutory role as primary *implementers* of the NAAQS." *American Trucking*, 531 U.S. at 470. Each State is to draft and submit to EPA for approval a state implementation plan (SIP) that, *inter alia*, provides for the attainment and maintenance of the NAAQS. See 42 U.S.C. 7407(a), 7410; *American Trucking*, 531 U.S. at 470. States have considerable discretion in developing the specific rules to which operators of pollution sources within their borders are subject; EPA must approve a SIP so long as it meets the criteria of 42 U.S.C. 7410(a)(1)-(2). See *General Motors*, 496 U.S. at

533. However, EPA is "charged with the administration of the Act[] and made ultimately responsible for the attainment and maintenance of the national standards." *Train* v. *NRDC, Inc.*, 421 U.S. 60, 93-94 n.28 (1975).

EPA and the States also share responsibilities in "clean air areas," *i.e.*, areas of the country in which the NAAQS for a given pollutant have been met or for which insufficient data exist to know whether they have been met. State implementation plans are to include a program to prevent significant deterioration of air quality in clean air areas, which include much of the State of Alaska. 42 U.S.C. 7410(a)(2)(C), 7471; Pet. App. 3a. EPA approved Alaska's Prevention of Significant Deterioration (PSD) program in 1983. 40 C.F.R. 52.96(a). In clean air areas, the CAA prohibits the construction or modification of large sources of air pollution (*i.e.*, "major emitting facilities") unless and until their operator secures a PSD permit. See 42 U.S.C. 7475(a), 7479(a)(1). Section 165(a)(1) of the CAA outlines several preconstruction "requirements" applicable to covered sources through a PSD permit. 42 U.S.C. 7475(a)(1).

"[P]rincipal" among these PSD requirements is that covered sources of air pollution be "subject to the best available control technology" (BACT) to minimize emissions of regulated air pollutants. 42 U.S.C. 7475(a)(4); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 407 (D.C. Cir. 1979). BACT is defined under the CAA, in pertinent part, as

> an emission limitation based on the maximum degree of reduction of each [covered] pollutant * * * emitted from * * * any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility.

42 U.S.C. 7479(3).[1] While the CAA does not mandate a specific type of emissions control technology for a particular type of source, permitting authorities commonly follow EPA's recommended "top-down" approach in determining what is BACT for a given source. Pet. App. 13a (citing EPA, *New Source Review Workshop Manual* (1990)). See, *e.g.*, *Sur Contra La Contaminacion* v. *EPA*, 202 F.3d 443, 446 n.3 (1st Cir. 2000). Under that approach,

> the applicant ranks all available control technologies in descending order of control effectiveness. The most stringent technology is BACT unless the applicant can show that it is not technically feasible, or if energy, environmental, or economic impacts justify a conclusion that it is not achievable. If the top choice is eliminated, then the next most stringent alternative is considered, and so on. The most effective control option not eliminated is BACT.

Pet. App. 13a (citation omitted). Petitioner purported to follow the "top-down" approach in arriving at the BACT determination at issue in the EPA orders before the court of appeals. *Ibid.*

PSD permitting authorities, typically state agencies (like petitioner), bear primary responsibility to ensure that BACT and the other preconstruction requirements

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[1] Alaska's federally-approved PSD program contains a parallel BACT requirement. See Alaska Admin. Code tit. 18, § 50.400(c)(3)(A) (1983); Alaska Admin. Code tit. 18, § 50.900(9) (1991).

of the PSD program are satisfied.[2] Indeed, permitting authorities have "significant discretion" in making PSD permit decisions. 63 Fed. Reg. 13,795, 13,796, 13,797 (1998). But EPA also plays an important oversight role following approval of a State's PSD program. The CAA directs permitting authorities to keep EPA informed of every PSD permit application and "of every action related to the consideration of such permit." 42 U.S.C. 7475(d)(1). In the majority of instances, beyond proffering comments, EPA finds no reason to take an active role in PSD permit decisions.

In those rare occasions where a permitting authority acts outside the bounds of its discretion, the CAA does authorize EPA to take action. Section 113(a)(5) of the CAA provides that on the basis of "any available information," EPA may "find[] that a State is not acting in compliance with *any* requirement or prohibition" of the PSD permit program. 42 U.S.C. 7413(a)(5) (emphasis added). To remedy a permitting authority's noncompliance, the CAA grants EPA a broad range of options. Specifically, under Sections 113(a)(5) and 167 of the CAA, EPA may: (1) "issue an order prohibiting the construction or modification" of the proposed source; (2) "issue an administrative penalty order" if construction or modification has already commenced; (3) "bring a civil action" for injunctive relief or civil penalties; and (4) "take such measures * * * as necessary to prevent the construction or

[2] Not all PSD permitting authorities are States. Counties or other local entities may assume permitting responsibility on behalf of a State. See 40 C.F.R. 51.100(g). An Indian Tribe may also be a permitting authority if it has an EPA-approved program. See 42 U.S.C. 7410(o). Additionally, EPA itself serves as a PSD permitting authority in areas that have no approved program. See 40 C.F.R. 52.21.

modification" of the proposed source. 42 U.S.C. 7413(a)(5), 7477. This case involves EPA's invocation and exercise of Sections 113(a)(5) and 167 of the CAA to prevent construction of a proposed source based on an unlawful PSD permit issued by petitioner.

2. Teck Cominco Alaska Incorporated (Cominco) operates a mine in northwestern Alaska that is the largest producer of zinc concentrates in the world. Pet. App. 3a-4a; see RER 46-001.[3] Cominco produces its own electricity at the mine. In 1998, Cominco submitted to petitioner an application for a PSD permit. Cominco sought permission, among other things, to increase the amount of emissions of nitrogen oxide (NOx), a regulated air pollutant, from one of its six existing 5,000 kilowatt diesel-fired power generators (labeled "MG-5").[4] Cominco urged the permitting authority to require, as BACT for MG-5, an emission control technology known as "Low NOx." Preliminarily, petitioner disagreed with Cominco; it opined that a more stringent type of technology—selective catalytic reduction (SCR)—should be installed as BACT on the modified generator. Pet. App. 4a; see RER 17-030, 17-040, 17-042. In fact, petitioner found that operating MG-5 at Cominco's requested level with SCR, rather than Low NOx, would reduce emissions of the pollutant by more than 450 tons per year—a 10-fold difference. See RER 17-043.

[3] "RER" refers to Respondents' Supplemental Excerpts of Record filed in the court of appeals. "PER" refers to Petitioners' Excerpts of Record filed in the court of appeals.

[4] NOx "play[s] a major role in the formation of ozone, particulate matter, haze, and acid rain." www.epa.gov/airtrends/nitrogen.html (last visited December 19, 2002).

In 1999, Cominco amended its PSD permit application. The amended application requested a permit to construct an entirely new generator, "MG-17." As with the equally-powerful MG-5, Cominco urged petitioner to require Low NOx as BACT for MG-17, which would be less costly than SCR. At the same time, Cominco offered to "retrofit" its six existing generators, including MG-5, with Low NOx. Petitioner was inclined to agree with Cominco's latest proposal and issued a draft permit decision to that effect. Pet. App. 4a.

EPA, as well as the National Park Service,[5] raised concerns with petitioner about its draft permit decision. EPA's view was that the facts and analysis in petitioner's own permit record supported only a conclusion that SCR, not Low NOx, was the best available control technology for the MG-5 and MG-17 generators. EPA explained that "the PSD program does not allow the imposition of a limit that is less stringent than BACT even if the equivalent emission reductions are obtained by imposing new controls on other emission units." Pet. App. 5a; RER 47-001. Petitioner subsequently agreed with EPA that it was improper for purposes of determining BACT on MG-17 to consider Cominco's offer to retrofit Low NOx on existing generators. PER 045.[6] It is undisputed that operating MG-17 with SCR, as opposed to Low NOx, would reduce emissions of NOx by 90%. PER 044, 045.

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[5] The National Park Service administers land 32 miles from Cominco's mine. The closest residential communities to the mine are the native villages of Kivalina and Noatak (16 and 20 miles, respectively). RER 36-018, 46-001.

[6] Cominco discovered that retrofitting existing engines would allow it to obtain a sufficient increase in power without triggering BACT review on any of them. See RER 55-002, 55-003; PER 043, 053, 132, 234.

Despite several meetings with EPA, petitioner and Cominco continued to insist that Low NOx, not SCR, qualified as the best available control technology for MG-17. Pet. App. 5a. On December 10, 1999, EPA issued petitioner a finding of noncompliance and order —the first of the three administrative orders before the court of appeals. See *id.* at 26a-37a. Pursuant to Section 113(a)(5), EPA found that petitioner would not be in compliance with the CAA and Alaska's implementation plan if petitioner issued the permit as then drafted (*i.e.*, with a determination that best available control technology for MG-17 was Low NOx). EPA explained the factual basis for that finding in a cover letter to the order. PER 234-235. In sum, EPA concluded that petitioner's BACT determination was arbitrary, capricious, and unsupported by petitioner's own record and analysis. Additionally, pursuant to Section 167 of the CAA, EPA directed petitioner not to issue the permit unless and until it made a valid BACT determination. See Pet. App. 36a-37a.[7]

Notwithstanding EPA's order, petitioner issued a PSD permit to Cominco later that same day. The permit purported to authorize construction of MG-17 with an operating emissions limitation based on a determination that Low NOx constituted BACT. Petitioner's "foremost consideration" in rejecting SCR in favor of Low NOx was to "support" Cominco's mining project and "its contributions to the region." Pet. App. 15a; PER 051. At the same time, however, petitioner's

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[7] After petitioner in fact issued the permit, EPA later withdrew the portion of the December 10, 1999, finding and order that ordered petitioner not to do so, stating that "the Order does not impose any continuing prohibitions or obligations to [petitioner]." See Pet. App. 19a.

report "fail[ed] to explain how the costs of SCR would affect the Mine's world competitiveness or why the capital cost is excessive." Pet. App. 15a. See PER 050-51.

In early February 2000, EPA renewed its finding that petitioner had failed to comply with federal and state PSD requirements. Pet. App. 5a; RER 5-002. On the same date, to ensure that Cominco would not commence construction under a PSD permit that EPA concluded was invalid, EPA issued the second of the three orders before the court of appeals. That order directed Cominco not to commence construction of MG-17 until it obtained a valid PSD permit. See Pet. App. 38a-50a. EPA amended the February order in March 2000; it reaffirmed the findings and conclusions of the February order but allowed Cominco to conduct some limited, weather-sensitive construction activity. Pet. App. 6a; see *id.* at 51a-64a.

All three of EPA's administrative orders hinged on a finding that petitioner did not subject the proposed source of air pollution to best available control technology and, therefore, did not act in compliance with the Clean Air Act in issuing the PSD permit. See Pet. App. 35a-36a, 47a, 49a, 60a, 62a.

3. Petitioner and Cominco petitioned for review of EPA's orders. They argued primarily that the CAA did not authorize EPA's action. While conceding that "EPA has considerable oversight and control over how states run their PSD permitting programs," petitioner and Cominco contended that such authority did not extend to a state permitting authority's BACT determination. Pet. C.A. Opening Br. 56. See *id.* at 53; Pet. C.A. Reply Br. 24, 29.

After oral argument and supplemental briefing on various legal and factual issues, the court of appeals

rejected the challenge brought by petitioner and Cominco to EPA's statutory authority. Examining the plain meaning of Sections 113(a)(5), 165(a), 167, and 169(3) of the CAA, the Ninth Circuit concluded that subjecting MG-17 to BACT was a PSD preconstruction "requirement" within the meaning of those provisions. As such, the BACT requirement fell within EPA's authority to find that petitioner was "not acting in compliance with any requirement" of the PSD program. 42 U.S.C. 7413(a)(5). While recognizing that "the state has discretion to make BACT determinations as the permitting authority," the court of appeals found no legal basis to exclude BACT determinations altogether from the scope of EPA's oversight and enforcement authority. Pet. App. 10a. Furthermore, given the breadth of remedies available to EPA where a finding of noncompliance has been made, the court found that EPA's remedial decisions to issue "orders were authorized by the plain language of Section 113(a)(5) * * * and of Section 167." *Id.* at 9a. Finally, the court of appeals confirmed its plain reading of the CAA with support from the Act's structure and legislative history. *Id.* at 9a-11a.

The Ninth Circuit also rejected the alternative argument made by petitioner and Cominco that EPA erred in its construction of the facts, *i.e.*, EPA's finding that petitioner misapplied the BACT requirement. Applying an "arbitrary or capricious" standard of review, the court of appeals found that EPA's findings were adequately supported. Indeed, the court agreed that petitioner's own permit record

> shows that (1) Cominco failed to meet its burden of demonstrating that SCR was economically infeasible; and (2) [petitioner] failed to provide a reasoned

justification for its elimination of SCR as a control option.

Pet. App. 16a. The court noted that petitioner's "apparent motivation for the elimination of SCR—appreciation for Cominco's contribution to the local economy" is "uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority —to protect states from industry pressure to issue ill-advised permits." *Ibid.*

ARGUMENT

The court of appeals correctly ruled that EPA's oversight and enforcement authority under Sections 113(a)(5) and 167 of the Clean Air Act extends to a permitting authority's determination of what constitutes the best available control technology for a covered source of air pollution such as Cominco's diesel-fired generator. The Ninth Circuit's construction of the Clean Air Act does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Contrary to petitioner's contention (Pet. 14-15), the court of appeals' opinion does not conflict with *Train* v. *NRDC, Inc.*, 421 U.S. 60 (1975), or any other decision of this Court. The Court in *Train* construed Section 110 of the CAA, which sets forth the requirements for approval by the EPA of a State's CAA implementation plan—its SIP. See 421 U.S. at 75-98. The Court's analysis in *Train* focused almost entirely on the various provisions of Section 110 and their relationship to one another. The Court in *Train* did not construe the materially different Sections 113(a)(5) and 167 of the CAA, which do not concern the requirements for EPA approval of a SIP and which were neither cited nor discussed in the Court's opinion in *Train*. Indeed,

Train was decided before the 1977 enactment of the PSD program at issue here (42 U.S.C. 7470-7479, 7491-7492) and the 1990 broadening of Section 113(a)(5) to include "*any* requirement" of the PSD program. See EPA C.A. Br. 58-59. And the Court in *Train upheld* EPA's construction of the provisions at issue in that case as "sufficiently reasonable that it should have been accepted by the reviewing courts," 421 U.S. at 75, a decision that gives no support to petitioner's effort to *reject* EPA's construction of the different provisions at issue here.

Moreover, contrary to petitioner's contention (Pet. 14), there is no inconsistency between *Train*'s discussion of the federal-state framework of the CAA and that applied by the court of appeals in this case. The issue in *Train* was whether EPA correctly approved Georgia's NAAQS implementation plan. Included in Georgia's SIP was "a variance procedure whereby particular sources could obtain individually tailored relief from general requirements." 421 U.S. at 69. The Court concluded that EPA appropriately limited its review of Georgia's SIP to whether "the ultimate effect of [the] State's choice of emission limitations is in compliance with the national standards," as opposed to directing what particular mix of emission limitations the State must promulgate into law. *Id.* at 79. Accord *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 269 (1976), cited at Pet. 15. Thus, *Train* involved the scope of EPA's authority to approve a SIP, not, as here, the scope of EPA's authority to oversee requirements of the CAA after a SIP has been approved.

Indeed, while it was not formally at issue in *Train*, the Court expressly recognized EPA's oversight role in that case. The Court stated that no air polluter could be granted a variance "until first the State, *and then*

the Agency, have determined that [it] will not jeopardize the [NAAQS]." *Train*, 421 U.S. at 93-94 n.28 (emphasis added). See, *e.g.*, *Union Elec.*, 427 U.S. at 252-253 n.3. Additionally, the Court observed that the CAA "imposes a duty of enforcement *on the Agency*" to enforce a SIP's emission limitations. *Train*, 421 U.S. at 92-93 n.27 (emphasis added) (citing the predecessor version of Section 113 of the CAA). Consequently, it is the position of petitioner, not the decision of the court of appeals, that is inconsistent with *Train*. See *id.* at 93-94 n.28 (as between the States and EPA, EPA is "ultimately responsible for the attainment and maintenance of the national standards"); Pet. App. 10a-11a (as between the States and EPA, "EPA has the ultimate authority to decide whether a state has complied with the BACT requirements of the Act and the state SIP.").

2. Nor does the court of appeals' decision conflict with that of any other court of appeals. Petitioner refers (Pet. 15-19) to three decisions of the D.C. Circuit, two decisions of the Seventh Circuit, and one decision of the Fifth Circuit. None of those decisions conflicts with the decision of the court of appeals in this case.

a. Four of the six decisions cited by petitioner involved issues not unlike that in *Train*—*i.e.*, the scope of EPA's authority in approving or dictating the contents of state implementation plans. In *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1, 5-9 (D.C. Cir. 2002), the D.C. Circuit vacated a particular method of weighing statutory factors promulgated by EPA as part of a rule implementing a provision of the CAA aimed at reducing haze in national parks and guiding States on the content of SIP revisions to that effect. In *Virginia* v. *EPA*, 108 F.3d 1397, 1403-1415, modified on other grounds, 116 F.3d 499 (1997), the D.C. Circuit invali-

dated an EPA rule directing States to update their SIPs with motor vehicle emission restrictions equivalent to those of California. In *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028, 1035 (1984), the Seventh Circuit found error in EPA's "partial approval" of a SIP whereby EPA attempted to make a state law "more stringent on its face than the state had ever intended it to be." And, in *Florida Power & Light Co.* v. *EPA*, 650 F.2d 579, 588 (1981), the Fifth Circuit reversed an EPA rulemaking in which EPA "insist[ed] * * * on incorporating into Florida's SIP a state pollution variance provision that is irrelevant to state compliance with the Clean Air Act." Like *Train* itself, none of those four decisions involved an issue of the type before the court of appeals in this case—the scope of EPA's authority to oversee a permit decision in a State with an approved SIP.[8] Nor did any of those four decisions involve provisions like Sections 113(a) and 167, which on their face grant EPA broad authority to "prohibit[] * * * the construction or modification of any major stationary source" where "a State is not acting in compliance with any requirement * * * of the chapter relating to the construction of new sources," 42 U.S.C. 7413(a)(5), and provide that EPA "shall * * * take such measures * * * as necessary to prevent the construction or modification of a * * * facility which does not conform to the requirements of" the statutory provisions designed to protect clean air areas, 42 U.S.C. 7477.

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[8] For example, while the D.C. Circuit in *American Corn Growers* found that EPA's rule purported to limit the States' ability to apply statutory factors, it did not (and had no occasion to) address EPA's authority to find that a State's application of those factors to any particular facts was unlawful.

Petitioner's attempt to rely (Pet. 16-17) on *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 361, 363-364 (D.C. Cir. 1980), is equally mistaken. The portion of *Alabama Power* relied upon by petitioner dealt solely with the requirement not to pollute above specified increments (Section 165(a)(3)), which is separate and distinct from the BACT requirement (Section 165(a)(4)). See 636 F.2d at 361-364. Furthermore, while the D.C. Circuit did decline environmental groups' invitation to order EPA to "prescribe the manner in which states will manage their allowed internal growth," the court recognized EPA's authority to "prevent or correct a violation of the increments." 636 F.2d at 361, 364. That recognition is consistent with the court of appeals' ruling in this case.

Likewise, there is no conflict between *United States* v. *AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994), and the court of appeals' decision in this case. In *AM General*, EPA issued a finding of state noncompliance and commenced an enforcement action after the permitting authority issued the permit and the operator modified its source in reliance on that permit. See *id.* at 474-475. While not sustaining that course of action, the Seventh Circuit did opine that EPA *could* have had a proper cause of action under Section 113(a)(5) if, as here, EPA issued a finding of noncompliance before the source operator proceeded with the modification. *Ibid.*[9]

b. If anything, there is consistency, not conflict, among the courts of appeals with respect to the scope of

[9] Petitioner's stated concerns (Pet. 19) that EPA could "invalidate a BACT determination * * * months, even years, after a permit has been issued" are inapposite on the facts of this case, where EPA acted *before* the permit was issued.

EPA's oversight and enforcement authority under the CAA's PSD program. In *Public Service Co.* v. *EPA*, 225 F.3d 1144 (2000), the Tenth Circuit held that it lacked subject matter jurisdiction to review opinion letters issued by EPA to a state permitting authority, in which EPA relayed its view that an operator of a proposed source needed a PSD permit. As part of its reasoning that EPA had not taken any "final agency action," the court stated:

> The EPA letters do not * * * cause a direct and immediate impact upon * * * the company actually seeking a permit * * * because it is [Colorado] as the permitting agency, and not the EPA, which will initially determine whether * * * a PSD permit is required. *Although the EPA ultimately could overturn any decision rendered by [Colorado]*, the opinion expressed in the two letters serves more like a tentative recommendation than a final and binding determination.

225 F.3d at 1147 (emphasis added; citing, among other authorities, 42 U.S.C. 7413(a)(5)). The Tenth Circuit in *Public Service*, like the court of appeals here, recognized that while States assume primary, first-instance duties, *inter alia*, to comprehensively review and make permit decisions about proposed new sources of air pollution, Congress intended EPA to retain a significant oversight and enforcement role even after it approves a plan that allows a State to become the PSD permitting authority. No court of appeals has stated or even suggested to the contrary.

3. The court of appeals' decision is correct. There is no question that EPA has "considerable oversight and control over how states run their PSD permitting programs," as petitioner (and Cominco) conceded before

the court of appeals. Pet. C.A. Opening Br. 56. See *id.* at 53; Pet. C.A. Reply Br. 24, 29. Petitioner, nevertheless, now suggests that the court of appeals should have interpreted the CAA as preventing EPA from taking the action it did here in the face of what it found to be petitioner's "arbitrary and erroneous," Pet. App. 12a, application of the CAA's BACT requirement. In declining to adopt that construction of the statute, the court of appeals did not err.

a. Ensuring that permitting authorities render reasoned and factually supported BACT decisions falls well within EPA's responsibilities under the CAA and its PSD program. Section 113(a)(5) expressly grants EPA the oversight authority to "find[] that a State is not acting in compliance with any requirement" of the CAA's PSD program. 42 U.S.C. 7413(a)(5). That provision, together with Section 167, also sets forth a specific range of administrative and judicial remedies for such noncompliance. See 42 U.S.C. 7413(a)(5), 7477. EPA's authority under those provisions expressly extends to "*any* requirement" and the "requirements" of the PSD program. 42 U.S.C. 7413(a)(5), 7477 (emphasis added). One of those "requirements" is that a covered source of air pollution (like the diesel-fired MG-17 generator) be "subject to the best available control technology." CAA Section 165(a)(4), 42 U.S.C. 7475(a)(4).

No part of the CAA, including the definition of BACT in Section 169(3), purports to exclude BACT determinations from the scope of EPA's oversight and enforcement authority. Application of BACT controls is "one of the principal substantive prerequisites to obtaining a PSD permit." *Alabama Power*, 636 F.2d at 407. The legislative history further confirms the national importance of the BACT requirement and EPA's important

role in this area.[10] Had Congress intended to limit EPA's authority over this key aspect of the PSD program, it would not have employed broad language like "*any* requirement." 42 U.S.C. 7413(a)(5) (emphasis added). See *Department of Housing & Urban Development* v. *Rucker*, 122 S. Ct. 1230, 1233 (2002) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). Nor is the BACT requirement beyond EPA's oversight authority simply because the CAA contemplates that a permitting authority may exercise substantial discretion in arriving at "an emission limitation" that is "achievable" and "based on the maximum degree of reduction * * * taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. 7479(3). Nearly every part of a permit decision involves exercise of discretion on the part of the permitting authority. Nevertheless, as the court of appeals persuasively reasoned:

> It does not follow from the placement of initial responsibility with the state permitting authority that its decision is thereby insulated from the oversight and enforcement authority assigned to the EPA in other sections of the statute.

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[10] See S. Rep. No. 127, 95th Cong., 1st Sess. 12 (1977) ("[T]here is a national requirement that each new major facility to be located in a clear air area install the best available control technology."); *ibid.* ("The Administrator's role is one of monitoring State actions * * * * The Administrator thus could go to court to stop a permit for activities which would exceed the increments of pollution or which otherwise did not comply with the requirements of [PSD], including use of best available control technology"); H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 153 (1977) ("The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit.").

Pet. App. 11a.

Petitioner, in fact, appears to concede (Pet. 14) that EPA may take enforcement action where a permitting authority fails altogether to consider one or more statutory factors in rendering a BACT decision. There is no functional distinction between complete failure to consider a statutory factor and what occurred in this case, *i.e.*, unreasoned or arbitrary application of factors. While purporting to consider the statutory factors and to follow the "top down" approach, petitioner failed to offer any reasoned or record support for its "foremost" reason to select Low NOx over SCR as BACT: general "support" for the mine's "contributions to the region." Pet. App. 15a.

b. Contrary to petitioner's suggestion, EPA has never construed the CAA as allowing it to simply "second-guess" or "substitut[e] its judgment" for that of a state permitting authority. Pet. (i), 16. Quite to the contrary, well before this litigation, EPA had stated that it may challenge a BACT determination only if the permitting authority has not "met all procedural norms, considered all available control technologies, *and given a reasoned justification of the basis of its decision.*" Pet. App. 12a (quoting a 1993 legal opinion from EPA's Office of General Counsel) (emphasis supplied by the court of appeals). The petition for certiorari does not challenge the court of appeals' substantive determinations that EPA correctly found that "Cominco failed to meet its burden of demonstrating that SCR was economically infeasible" and that petitioner "failed to provide a reasoned justification for its elimination of SCR as a control option." *Id.* at 16a. Accordingly, this case does not, as petitioner contends, present the question whether EPA may second-guess a State's BACT determinations at will. Instead, it presents the question whether EPA has any authority to act under Sections 113(a)(5) and 167, where a State has granted a permit based on a BACT determination for which there is no reasoned justification.[11]

4. Petitioners err in contending (Pet. 21) that the court of appeals' decision will cause "far-reaching" disruption to federal-state relations under the CAA. The federal-state framework applied by the court of appeals reflects EPA's longstanding and consistent construction of its oversight authority. As early as 1983, an EPA guidance document explained that

> [o]nce its PSD SIP provisions have been approved * * *, the State, rather than EPA, assumes primary responsibility for administering the PSD program. The Agency does not completely relinquish its obligations, however. Rather, it assumes an oversight function * * * * If the State fails to take appropriate action * * * EPA must take measures adequate to prevent the construction of the noncomplying source * * * * EPA retains PSD enforcement authority and, where appropriate, is expected to initiate PSD enforcement proceedings

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[11] Although the EPA was correct in its determinations in this case, the availability of judicial review ensures that EPA will not usurp the States' authority in this area. For example, in enforcing a finding of noncompliance or order, EPA may have to convince a district court that the permitting authority arbitrarily or capriciously applied the BACT requirement. See Pet. App. 22a & n.1 (citing 42 U.S.C. 7413(b)). Similarly, where, as here, a court of appeals is convinced that EPA took a "final action" so as to invoke its subject matter jurisdiction, EPA must defend its finding of noncompliance under an arbitrary-or-capricious standard of review. 42 U.S.C. 7607(b)(1); Pet. App. 18a-21a.

> both before and after the PSD SIP revisions have been approved.

RER 69-003. See also RER 69-007 (advising that EPA may "utilize the provisions of § 167 to prevent a source from construction with a State-issued permit that EPA feels is invalid," and referencing "BACT requirements"). Similarly, a 1988 EPA guidance document provides that

> Because PSD permits are issued on a case-by-case basis, taking into consideration individual source factors, permitting decisions involve the exercise of judgment. However, although not an exhaustive list, any one of the following factors will normally be sufficient for EPA to find a permit "deficient" and consider enforcement action:
>
> * * * * *
>
> 2. BACT determination not based on a reasoned analysis.

Decl. of Douglas E. Hardesty, Attach. E, COM 70-002.[12] That construction was reinforced in a 1993 EPA legal opinion. See Pet. App. 12a. And, in response to comments in rulemakings approving various States' PSD programs, EPA has expressly restated its view of its oversight responsibilities. See 57 Fed. Reg. 28,093, 28,095 (1992) (Texas); 58 Fed. Reg. 10,957, 10,961 (1993) (Connecticut); 63 Fed. Reg. 13,795, 13,796 (1998) (Virginia).

EPA's reading of its authority is consistent with Congress's intent in granting EPA a limited but important

[12] EPA submitted this declaration (to which the above-quoted record document is attached) to the court of appeals pursuant to its invitation. See Pet. App. 7a, 22a.

oversight role. Absent EPA authority to prevent issuance of permits based on objectively unreasonable BACT determinations, some States might be tempted to engage in a destructive competition to attract industry through lax implementation of the environmental laws. This record shows why that is important. As the court of appeals recognized, petitioner's

> apparent motivation for the elimination of SCR—appreciation for Cominco's contribution to the local economy—is not an accepted justification in the top-down approach. Worse still, it is uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority—to protect states from industry pressure to issue ill-advised permits.

Pet. App. 16a (citing S. Rep. No. 127, *supra*, at 136).[13] In short, the court of appeals' decision maintains the federal-state partnership as historically and consistently construed by "the Agency charged with the administration of the Act." *Train*, 421 U.S. at 94 n.28.[14]

[13] Contrary to petitioner's suggestion (Pet. 20), there is no evidence that "more jobs" would be created if the permit could issue in this case. In fact, there was no evidence before petitioner that Cominco's operations would be any different if it installed SCR rather than Low NOx on MG-17. See Pet. App. 15a; EPA C.A. Br. 65.

[14] Insofar as any ambiguity exists in the statutory provisions before it, EPA's longstanding and consistent construction of its oversight authority is entitled to deference under step two of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 02-658

IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

The Solicitor General acknowledges (Opp. 5) that the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, gives each State "*primary* responsibility" for assuring air quality within its borders. *Id.* at § 7407(a) (emphasis added). A "key" tool in "manag[ing] * * * allowed internal growth" under the Act, *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 364 (D.C. Cir. 1980), is the ability to determine BACT for particular sources, and the CAA squarely "places this responsibility *with the State*, to be determined in a case-by-case judgment." S. Rep. No. 95-127, at 31 (1977) (emphasis added). Exercising its authority in this case, the State of Alaska considered the requisite statutory factors and made a permitting decision that would not only result in cleaner air than if the EPA's choice of technology had been selected, but

that recognized "the importance of the [Red Dog] mine to the regional economy of the Northwest Arctic Borough." PER 387. In overriding Alaska's BACT determination, the EPA plainly usurped the State's authority under the CAA, upsetting the delicate balance of power between the States and the federal government that Congress carefully sought to create under the Act and numerous similar statutory schemes embodying the principle of "cooperative federalism."

As evidenced by the numerous amici who urge this Court to grant review in this case,[1] the question presented here is one of undeniable national importance. The United States asks this Court to ignore the significance of this case, as well as the multiple conflicts between the Ninth Circuit's decision below and those of this Court and other federal courts of appeals. But a decision with such troubling and far-reaching implications should not be permitted to stand unreviewed.

1. The Ninth Circuit's decision conflicts with decisions of this Court and those of other federal courts of appeals on the basic jurisdictional question of how federal-state authority is allocated under the CAA. *See* Pet. 14-19. In response, the Solicitor General goes for the capillaries, stressing that the decisions cited in the petition actually involved different subsections of the CAA than those involved here. *See* Opp. 12-16. But such pettifoggery cannot obscure the fundamental conflict between the Ninth Circuit's decision and the decisions of this Court and other federal courts of appeals. Whereas other courts have recognized and respected the basic "division of responsibilities" between the States and the federal government under the CAA, *Train* v. *Natural Re-*

[1] *See* Brief of Amici Curiae States of North Dakota, Wyoming, Alabama, Delaware, Iowa, Montana, Nebraska, Nevada, South Dakota, and Utah in Support of Petitioner; Brief Amicus Curiae of the Center for Energy and Economic Development in Support of the Petition for Writ of Certiorari; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petition for a Writ of Certiorari.

sources Defense Council, Inc., 421 U.S. 60, 79 (1975), and have refused to allow the EPA to infringe upon the States' authority by acting as the primary regulator in those areas where that responsibility has been given to the States, the Ninth Circuit disregarded Congress's careful allocation of power under the Act, and permitted the EPA to usurp authority clearly reserved to the States.

a. In its green eyeshade zeal to distinguish the cases cited in the petition, the federal government glosses over *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (D.C. Cir. 2002), a case involving a provision of the CAA strikingly similar to the one at issue here. Section 169A of the CAA requires the States to determine the best available retrofit technology ("BART") for particular sources by taking into consideration certain enumerated statutory factors. *See* 42 U.S.C. § 7491(g)(2). Section 169(3) likewise requires the States to determine BACT by taking into account certain enumerated statutory factors. *See* 42 U.S.C. § 7479(3) ("best available control technology" means an emission limitation * * * which the permitting authority [*i.e.*, the State], on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility"). In *American Corn Growers*, the D.C. Circuit refused to allow the EPA to dictate to the States the manner in which they were to make BART determinations, holding that the EPA's attempt to do so was "inconsistent with the Act's provisions giving the states broad authority over BART determinations." *Id.* at 8. In sharp contrast, the Ninth Circuit in this case permitted the EPA to dictate Alaska's BACT determination, notwithstanding the Act's provisions giving the States broad authority over BACT determinations. This irreconcilable conflict alone provides a compelling basis for review.

b. Attempting to dismiss the conflict between the decision below and this Court's decision in *Train*, *supra*, the United States notes that in *Train* this Court "expressly

recognized EPA's oversight role." Opp. 13-14. That observation, however, was in the context of considering a provision of the CAA that *expressly* required the EPA's approval of a SIP variance. *See* 421 U.S. at 75 (quoting since-repealed Section 110(a)(3)(A) of the CAA). Here, by contrast, no provision of the CAA gives the EPA the authority to invalidate a State's BACT determination. To the contrary, the CAA expressly provides the States with broad discretion to make case-by-case BACT determinations. *See* 42 U.S.C. § 7479(3). Moreover, the Court's observation in *Train* that "the CAA 'imposes a duty of enforcement on the Agency' to enforce a SIP's emission limitations," Opp. 14 (quoting *Train*, 421 U.S. at 92-93 n.27) (emphasis omitted), is of no significance here, where it is undisputed that Alaska's permitting decision did not violate its SIP emission limitations. The Solicitor General's observation that the court in *Alabama Power, supra*, "recognized EPA's authority to 'prevent or correct a violation of the increments,' " Opp. 16, is likewise besides the point, because all agree that this case does not involve an increment violation.

c. The Solicitor General also attempts to dismiss the conflict with Seventh Circuit's decisions in *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028 (7th Cir. 1984), and *United States* v. *AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994), by noting that the EPA in this case took action before Cominco's permit was issued. *See* Opp. 16 & n.9. But the United States does not—and cannot—deny that the Ninth Circuit's decision grants the EPA unfettered discretion to invalidate a State's BACT determination at any time, even years after a permit has been issued and a source has invested in technology approved by the State. The Ninth Circuit's decision thus casts a cloud of uncertainty over state PSD permitting decisions, and threatens to subject regulated entities to increased bureaucratic delay. *See* States Amicus Br. 11.

d. The Solicitor General's reliance (Opp. 17) on *Public Service Co.* v. *EPA*, 225 F.3d 1144 (10th Cir. 2000), is misplaced. That case involved the quite different question whether a particular source was required under the CAA to obtain a PSD permit in the first place. If the source were in fact required to do so, the EPA could take steps to enforce that requirement. *See* 42 U.S.C. § 7413(a)(5). That accounts for the court's passing statement that the EPA could ultimately overturn the State's decision in *that* regard. *See* 225 F.3d at 1147. The court by no means suggested that the EPA would be free to override a determination—such as BACT—that the CAA plainly commits to the State's discretion through the case-by-case weighing of a variety of factors.

2. The national importance of this case is undeniable. The question presented affects thousands of entities across the nation. Indeed, the federal government itself acknowledges "the national importance of the BACT requirement." Opp. 18. Congress gave the States broad discretion to make BACT determinations that specifically take into account "considerations as anticipated and desired economic growth for the area." S. Rep. No. 95-127, at 31. The Ninth Circuit's decision strips the States of their authority to make "flexible" BACT determinations, *id.*, in "manag[ing] their allowed internal growth" under the CAA. *Alabama Power*, 636 F.2d at 364. If Alaska is not allowed the flexibility to make a BACT determination that actually results in cleaner air while taking into account particular local conditions in a community above the Arctic Circle, it is difficult to imagine what Congress had in mind in the CAA. And the Ninth Circuit's decision is even more far-reaching, threatening the balance of power struck by Congress and the States under numerous other "cooperative federalism" statutory schemes. *See* Pet. at 21-22.

The United States maintains that the Ninth Circuit's decision will not "disrupt[] * * * federal-state relations under the CAA." Opp. 21. The States that have filed a brief in support

of certiorari see things differently, arguing that the decision below "skews the federal-state partnership envisioned by Congress" under the CAA, and that it will have "an enormous effect" on the implementation of all state permitting programs. States Amicus Br. 1, 11. As the States explain, as a result of the Ninth Circuit's decision, regulated entities are "left with uncertainty whether and when EPA will choose to inject itself into the state permitting process," and thus will have little incentive to work with the States on BACT and other permitting issues. *Id.* at 11. Moreover, because the EPA can override a State's BACT determination at any time, the decision below will inevitably lead to a "waste of state resources." *Id.* at 3. The States urge this Court to grant review in this case and "correct the imbalance wrought by the Ninth Circuit's decision." *Id.* at 1.

3.a. The Ninth Circuit's decision not only has precipitated conflicts on a question of national importance, but it is also wrong. Nothing in the CAA gives the EPA unilateral authority to overturn a State's case-by-case BACT determination.[2] The fact that a State weighs the statutory factors differently than the EPA in any particular case does not mean that the State has in any sense violated a requirement of the Act, authorizing the EPA to overturn the State's judgment. There is simply no support in the CAA for the federal government's conclusion—and that of the Ninth Circuit—that the States have only " 'initial responsibility' " for determining BACT. *See* Opp. 19 (quoting Pet. App. 11a).[3]

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[2] A State's BACT determination, however, may not permit a facility's emissions to exceed the NAAQS, PSD allowable increments, or other standards established under the Act. *See* 42 U.S.C. §§ 7475(a)(3), 7479(3). Moreover, in one narrow circumstance—an exception that proves the rule—the CAA specifically requires the EPA's approval of a particular BACT determination. *See id.* § 7475(a)(8).

[3] Invoking *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Solicitor General argues

Nor is there any support in the Act's legislative history. The United States relies on excerpts stating, for example, that the EPA could take action " 'to stop a permit * * * which * * * did not comply with the requirements of [the PSD program], including the use of [BACT].' " Opp. 19 n.10 (quoting S. Rep. No. 95-127, at 12). But apart from the requirement that no major emitting facility may be constructed or modified in a clean air area unless "the proposed facility is subject to [BACT]," 42 U.S.C. § 7475(a)(4), the only BACT "requirement" imposed by the Act is that a *State* take into account "energy, environmental, and economic impacts and other costs" in determining BACT. *Id.* § 7479(3). As discussed, nothing in the CAA authorizes the EPA to overturn a State's particular BACT determination based on the consideration of the pertinent statutory factors.

Like the Ninth Circuit below, the Opposition completely ignores the most pertinent legislative history—that making clear that "[t]he decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility with *the State*, to be determined in a case-by-case judgment." S. Rep. No. 95-127, at 31 (emphasis added). *See also id.* ("It is recognized that the phrase has *broad flexibility* in how it should and can be interpreted,

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for deference to certain EPA guidance documents and an EPA legal opinion "[i]nsofar as any ambiguity exists in the statutory provisions" at issue. Opp. 21-23 & n.14. Those provisions, however, do not admit of any ambiguity. Moreover, the federal government has already lost the argument that such documents—not promulgated in the exercise of congressionally delegated authority to make rules carrying the force of law—are entitled to *Chevron* deference. *See United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). The Solicitor General also cites EPA responses to comments in various rulemakings, *see* Opp. 22, but none of those responses express the view here that the EPA may overturn a BACT determination because it disagrees with the State's analysis of the statutory factors in a particular case.

depending on site.") (emphasis added); *id.* ("The weight assigned to such factors is to be determined by the State."); *id.* (BACT is "strictly a State and local decision").

b. Importantly, this is not to say that the EPA is without recourse when it believes a State has made an unreasonable BACT determination. The CAA provides that each State must—as Alaska did here—"transmit to the [EPA] a copy of each [PSD] permit application relating to a major emitting facility received by such State and provide notice to the [EPA] of every action related to the consideration of such permit." 42 U.S.C. § 7475(d). In this case, the EPA was free to participate in the public comment process on Cominco's draft permit, and then, if it still disagreed with the State's action, challenge Alaska's BACT determination through the administrative review process, which includes a right of judicial review. *See* Pet. 18-19. The Solicitor General does not dispute that the EPA could have pursued this remedy.

What the EPA may not do, however, is unilaterally substitute its judgment for what constitutes BACT whenever it disagrees with a State's determination. That is precisely what the EPA did here. Long before Alaska issued Cominco's PSD permit and a final TAR explaining the basis for its determination that Low NOx was BACT for the MG-17 generator, the EPA informed the State of *its* view that SCR was BACT for the generator. *See* PER 385. Throughout the negotiations that followed, the EPA never budged from that position. Indeed, in its order blocking the issuance of Cominco's permit, the EPA did not admonish Alaska to provide "a reasoned justification of the basis of its decision," Opp. 20 (emphasis and quotation omitted), but rather demanded that the State "satisfactorily document[] why SCR is not BACT for the [MG-17] generator." Pet. App. 36a.

c. Moreover, Alaska *did* provide a reasoned justification for its BACT determination in this case.[4] The State spent nearly ten pages explaining the basis of its decision, specifically taking into account "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). After initially rejecting Cominco's contention that requiring SCR would have adverse environmental and energy impacts, the State concluded that SCR was not economically feasible because of its "excessive economic cost"—$2.9 million in capital costs and annual operating costs approaching $635,000. PER 051. Indeed, the United States does not dispute that SCR has *never* been required as BACT for a similar type of generator. Recognizing the Red Dog Mine's importance to the particularly vulnerable and isolated local community, the State decided not to impose a prohibitively expensive technology that might affect the mine's "world competitiveness." *Id.* Alaska's BACT determination in this case was precisely the sort of determination Congress intended States to make under the CAA, which specifically directs the States to consider "economic impacts" in determining BACT on a case-by-case basis. 42 U.S.C. § 7479(3). *See also* S. Rep. No. 95-127, at 31 (States to take into account such considerations as "*anticipated and desired economic growth for the area.*") (emphasis added).[5] The

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[4] The Opposition incorrectly states that the petition does not challenge the Ninth Circuit's determination that the EPA correctly concluded that Alaska had not provided a reasoned justification for its BACT determination. *See* Opp. 20. That issue is squarely embraced by the question presented—"[w]hether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska." Pet. i. Moreover, the petition specifically demonstrates that Alaska made a "carefully considered determination that Low NOx was BACT for the MG-17 generator." Pet. 8. *See also id.* at 20-21.

[5] The concern that "States might be tempted to engage in a destructive competition to attract industry through lax implementation of the environmental laws," Opp. 23 (citing Pet. App. 16a), is

State's permitting decision, moreover, resulted in *cleaner* air than would be the case under the EPA's preferred approach,[6] while allowing the creation of more jobs for the precarious economy of the Northwest Arctic Borough. That is how "cooperative federalism" is supposed to work.

* * *

For the foregoing reasons, and those in the petition and the briefs amicus curiae, the petition for a writ of certiorari should be granted, and the judgment below reversed.

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misguided in this case, because the Red Dog Mine—the world's largest source of zinc concentrate—is not going anywhere.

[6] The Solicitor General does not deny that the State's permitting decision in this case was expected to result in *lower* emissions than if the technology preferred by the EPA were installed on only the MG-17 generator.

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No. 02-658

In the

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Clean Air Act, can the EPA override a State permit decision when the State is authorized to carry out its own air pollution program and the permit does not violate any federal standard?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. PLF was founded in 1973 and provides a voice in the courts for mainstream Americans who believe in limited government, individual rights, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast.

In its fight to protect fundamental constitutional rights, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the Court in resolving the underlying legal issues. PLF supports a broad view of the public interest and promotes balance and common sense in the administration of laws and regulations.

There is an alarming trend among federal agencies and the courts to expand the enforcement power of the federal government by adopting statutory interpretations that cannot be squared with the plain meaning of the act, the intent of Congress, or constitutional principles of federalism. This case is a singular example of government overreaching.

The Ninth Circuit has held that the EPA may override a discretionary permit decision of a State, under a federally-

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

approved state air pollution program, without a showing that the decision will violate any federal air pollution standard. If it stands, the Ninth Circuit opinion will undermine state and federal cooperation—an essential ingredient in addressing the Nation's goals for cleaner air—and nullify the enforcement power of the States as recognized by the Clean Air Act (CAA).

PLF has a long history of amicus participation in environmental cases before this Court. For example, PLF was an amicus participant in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). PLF believes its public policy perspective will provide a necessary viewpoint in this case.

STATEMENT OF THE CASE

Teck Cominco Alaska, Inc. (Cominco) owns and operates a mine, known as the Red Dog Mine, in the State of Alaska in partnership with the Northwest Arctic Native Association on Association property. The mine lies 100 miles above the Arctic Circle in a remote part of the state and is the largest zinc concentrate producer in the world. The closest residential communities are the native villages of Kivalina and Noatak. The mine is the largest private employer in a vast area with an historically high unemployment rate. Power for the mine, which operates continuously, is provided by the mine's six diesel-driven electric generators. To increase production, in 1998 Cominco proposed the addition of a new generator. The State of Alaska is an "attainment" or clean air area for nitrogen

oxide (NOx) and because this generator would increase NOx emissions, Cominco was required to obtain a Clean Air Act permit known as a PSD (Prevention of Significant Deterioration) permit. PSD permits are available from the Alaska Department of Environmental Conservation (ADEC) under the State's EPA-approved clean air program. As a permit condition, new sources of NOx emissions must be equipped with BACT (best available control technology) to minimize pollutants. BACT is defined as:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 U.S.C. § 7479(3).

One option for BACT involved the use of Selective Catalytic Reduction, or SCR, on the new generator. SCR is a process involving injection of ammonia or urea into the exhaust and combining with a catalyst to ensure more complete combustion. However, ADEC concluded that the cost of SCR was excessive—$2.9 million in capital costs and nearly $635,000 in annual operating expenses. As an alternative, Cominco proposed installing "Low NOx" controls on *all* of its generators, not just the one subject to permitting. This method relies on high-combustion air temperatures to atomize toxic particles and reduce NOx emissions. ADEC determined that this technology was more cost effective than SCR and the use

of "Low NOx" on *all* the generators would reduce overall emissions from the mine more than SCR on the new generator. In 1999, ADEC designated "Low NOx" controls as BACT and issued Cominco a PSD permit.

Only after the close of the comment period did EPA express its disagreement with ADEC's BACT determination ordering ADEC to require the use of SCR on the new generator. Since SCR had never been required as BACT for this type of generator, was less cost effective than "Low NOx" controls, and could result in more overall emissions, ADEC refused to modify its permit. As a result, EPA ordered Cominco not to operate the new generator. Cominco and ADEC then filed suit in federal court for a determination of whether the EPA has unilateral authority to override the State's discretionary BACT determination. In July, 2002, the Ninth Circuit held that the EPA *can* override a state's BACT determination. The State of Alaska has now petitioned the case to this Court.

INTRODUCTION

This is apparently the first case in which the EPA has invaded a state's enforcement authority and vetoed a state BACT determination. Until now, EPA has deferred to the States as the CAA requires. This case represents a dangerous precedent related to EPA oversight of state air pollution programs and changes the standard for BACT. EPA has consistently maintained that BACT requires a consideration of the type of emission controls used in similar situations and the economic efficiency of the controls imposed. But in this case, the BACT imposed by EPA is unique (i.e., Selective Catalytic Reduction has never been required for a generator of the type used at the mine) and the EPA is now asserting that the economic efficiency of the controls is irrelevant to a BACT determination if the company has the financial ability to

implement the more costly emission controls. Moreover, the Ninth Circuit opinion has created a conflict with the decisions of this Court and other circuits.

This case is important for other reasons as well. With increasing frequency, EPA is interfering with state enforcement efforts under a number of federal environmental statutes. In addition to the CAA, states may implement their own programs under the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). These state programs must be equal to, or more stringent than, the corresponding federal law and the state programs must be approved by the EPA. But, the Agency still overrides state permit decisions and files duplicative federal suits against polluters because the EPA is dissatisfied with the conditions imposed or the penalties sought. This has bred distrust between state and federal enforcers and has generated uncertainty among the citizens in the regulated community who cannot rely on their dealings with state officials so long as the EPA claims it can invalidate state enforcement decisions. In addition to the present CAA case, this Court will be asked in the current term to consider an RCRA case where the EPA has interfered with a state's enforcement effort. That case is *Power Engineering Company v. United States*, 303 F.3d 1232 (10th Cir. 2002).

On November 14, 2002, this Court granted an extension of time to Pacific Legal Foundation (amicus in this case) to file a Petition for Writ of Certiorari in *Power Engineering* to January 17, 2003 (Application No. 02A393). In that case, the EPA filed a federal suit to require certain financial assurances from Power Engineering after the State had already settled its dispute and had won $1.2 million in penalties from the company. Under RCRA, "[a]ny action taken by a state under a hazardous waste program . . . shall have the same force and effect as action taken by the Administrator [of the EPA]" 42 U.S.C. § 6926(d). However, the EPA claims it has unilateral authority to enforce RCRA notwithstanding the state program.

Clearly, then, the present case is not an isolated incident, nor is the issue of EPA authority in light of a state authorized enforcement program limited to the CAA. Although these federal environmental laws have different statutory provisions defining the federal-state relationship, they all vest authority in the State to pursue its own enforcement strategy. Whether the EPA can interfere with that strategy, thereby breeding distrust and uncertainty, is an important federal question warranting definition by this Court. Therefore, this Court should grant the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

An objective of the Clean Air Act, as with similar environmental laws, is to establish a viable federal-state partnership in the Act's implementation. This is essential to achieving the statutory goals of a cleaner and safer environment. However, the EPA's practice of undermining state enforcement decisions generates distrust, creates uncertainty, and generally defeats attempts at meaningful cooperation between state and federal officials. The EPA's practice of interfering with state enforcement efforts also wastes state and federal resources, conflicts with the historical role of states in dealing with local environmental problems as recognized by the CAA, and is counterproductive.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW AUTHORIZES EPA TO USURP THE ENFORCEMENT ROLE ASSIGNED TO THE STATES UNDER THE CAA WHICH UNDERMINES THE FUNDAMENTAL CONCEPT OF FEDERAL AND STATE COOPERATION EMBODIED IN THE ACT AND NULLIFIES THE CLEAR CONGRESSIONAL INTENT TO RELY ON STATE ENFORCEMENT STRATEGIES

This Court should grant the Petition for Writ of Certiorari not only because the decision below is contrary to the plain meaning of the CAA and conflicts with the decisions of this Court and other circuits, as documented by Petitioners in the Petition for Certiorari, but also because the EPA's insidious practice of overriding discretionary decisions of the States disrupts the federal-state partnership and undercuts the States' enforcement goals.

In the CAA, Congress recognized the preeminent role of the States in addressing air pollution:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 7407(a).

The effect of this provision was clearly set out by this Court in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975):

> The [EPA] is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under §110(a)(2), the Agency is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

Id. at 79.

But notwithstanding the clearly stated deference the EPA is to give authorized States, the EPA seems to believe its mandate for cooperation evaporates once a State is certified. This is evident from the EPA's practice of nullifying state enforcement decisions, like Alaska's BACT determination in this case, to seek its own enforcement goals.

In their article, *The Federal and State Roles in Environmental Enforcement: A Proposal for More Effective and More Efficient Relationship*, 14 Harv. Envtl. L. Rev. 7

(1990), Hubert H. Humphrey and LeRoy C. Paddock recount the EPA's history of interfering with state enforcement efforts under numerous environmental laws, including the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act. Although the authors are focused on the practice of "overfiling," where the EPA sues a violator concurrently or subsequently to the state, the authors' conclusions apply equally to the present case where the EPA has nullified the State's enforcement strategy. Indeed, the EPA's unilateral issuance of an order to both the State of Alaska and Cominco, invalidating the State's permit, was a form of "overfiling." The power to veto a state permit decision and the power to file a separate federal lawsuit when the State has acted derives from the same source — EPA's assertion, upheld by the Ninth Circuit below, that the Agency is not bound by the enforcement decisions of the State under a federally-authorized environmental protection program.

According to the authors, one of whom was Attorney General of the State of Minnesota, unilateral enforcement by the EPA is disruptive to state enforcement programs in a number of ways. Primarily, it increases the reluctance on the part of regulated entities to deal only with state enforcement officials. Obviously, if EPA can usurp a State's decision making power, regulated entities cannot be certain that a permit decision, or compliance schedule, or a penalty amount agreed to by the State is final. One result is that States may find it harder to negotiate concessions with regulated entities. *Id.* at 13-14. At best, this is counterproductive. At worst, it unnecessarily delays the resolution of polluting activities to the ultimate injury of the people and the environment.

Another result of EPA's invasion of the State's enforcement authority is that it breeds distrust between federal and state enforcement officials. Indeed, the very act of "overfiling" or countermanding a State permit decision, as occurred in this case, is a breach of trust. Once a State is

authorized to enforce the federal program, the State stands in lieu of the EPA. This authorization is meaningless, however, if the EPA can override virtually any act of the State with which federal officials disagree. Moreover, this disagreement may not have anything to do with the State's substantive response to the environmental problem. So it was in this case.

ADEC concluded that "Low NOx" controls was BACT for the Red Dog Mine because it minimized emissions and was substantially more cost effective than other alternatives. The Ninth Circuit acknowledged this fact and the EPA has not shown otherwise. *See Alaska v. United States EPA*, 298 F.3d 814, 817 (9th Cir. 2002). Nevertheless, the EPA ordered ADEC and the mine to utilize a more expensive, perhaps even economically infeasible, but potentially less effective emission control technology. This action not only demonstrates the EPA's open disregard for the State's duly authorized air pollution program, but undermines Alaska's enforcement objectives.

Those objectives include demonstrating a concern for the local economy and encouraging permit applicants to go beyond regulatory requirements to improve air quality. When ADEC considered BACT alternatives for the Red Dog Mine, it expressed considerable concern for the potential loss of jobs that would result from the more expensive SCR technology the EPA preferred. According to ADEC, the Red Dog Mine caused a dramatic reversal in unemployment rates in the local borough:

> "Before the Mine opened in 1990, borough wages were well below state average wages .... The Mine now provides high paying year round employment. ... Cominco's contractors, vendors, and wages have boosted the borough's private sector economy.
>
> ... With government support and endorsement of Cominco's operations, including the Production Rate Increase Project, the Red Dog Mine will continue to influence and benefit the residents and economy of this region."

298 F.3d at 823.

ADEC also expressed concern that the use of SCR, rather than "Low NOx" controls, would hamper the mine's world competitiveness. *Id.* These are the very types of "economic impacts and other costs" the CAA expressly requires the State to consider in determining BACT. *See* 42 U.S.C. § 7479(3).

But beyond the economic considerations, the State took into account the overall goal of the CAA and the purpose of BACT, to minimize emissions, and authorized the use of "Low NOx" controls. Instead of the more costly and potentially less effective SCR, Cominco was willing to install "Low NOx" technology on all of the mine's generators, even those not subject to BACT requirements. Thus, the State was able to gain concessions from the Red Dog Mine it could not require by regulation and minimize emissions at the same time.

This Court recognized an analogous situation in a case called *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). In *Gwaltney*, this Court considered whether the citizen suit provision in the Clean Water Act authorized citizen suits for wholly past violations. The Court determined the Act did not confer such jurisdiction. Concluding that the citizen suit provision of the Clean Water Act was intended to support the government's enforcement program and not displace it, the Court suggested a hypothetical to make its point. Suppose, the Court said, the Administrator of the EPA identified a violator and issued a compliance order. *Id.* at 60. "Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 60-61. "If citizens could file suit, months or years later, in order to seek the civil

penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61.

But that is the case here. If the EPA can invalidate a state enforcement decision with which it disagrees, as the lower court held, to pursue its own enforcement goals, then the State's discretion to enforce the CAA in the public interest would be curtailed considerably.

Demonstrating a concern for the local economy and encouraging permit applicants to go beyond regulatory requirements to improve air quality are both laudable and legitimate state enforcement objectives. But EPA's invalidation of ADEC's permit decision undermined the State's enforcement program by advancing federal goals that are inconsistent with the State's goals. Moreover, the EPA's nullification of Alaska's enforcement strategy harms the local community and, ironically, the environment.

Under the CAA, the State receives federal authorization only after satisfying the EPA that the State program meets all federal standards for implementation, maintenance, and enforcement. *See* 42 U.S.C. § 7410(a)(1). Alaska met these exacting standards and received state authorization from the EPA. At no time in this case has the EPA questioned the State's fitness to keep its State authorization or threatened sanctions against the State for failure to meet federal air pollution standards, although the EPA has the power to impose sanctions, including the suspension of federal highway moneys. *See* 42 U.S.C. § 7509. At root, the EPA's only objection stems from the EPA's preference for a more costly, but less effective, control technology than the State of Alaska selected. Since the State's selection would have minimized emissions, it defies common sense and the clear purpose of the Act to allow the EPA to interfere with the state's enforcement strategy. Therefore, the Petition for Writ of Certiorari should be granted.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE IMPOSITION BY EPA OF AN INDEPENDENT AND CONFLICTING ENFORCEMENT STRATEGY IS CONTRARY TO THE REGULATORY SCHEME ADOPTED BY CONGRESS TO PROMOTE STATE RESPONSIBILITY FOR CLEAN AIR AND IS COUNTERPRODUCTIVE TO THE GOALS OF THE CAA

In his article, *State/Federal Enforcement of the Clean Air Act and Other Federal Pollution Laws: Federal Overfiling on State Enforcement Proceedings*, 1987 B.Y.U.L. Rev. 1085, Steven Cook examines the practice of "overfiling," and by implication EPA nullification of other state enforcement decisions, such as Alaska's BACT determination in this case. He concludes that, on balance, EPA interference with state enforcement strategies does not help the agency achieve its goals of deterrence, fair and equitable treatment of the regulated community, and rapid resolution of environmental problems.

Cook identifies three main problems with EPA interference with state environmental enforcement. First, subsequent negotiations with the EPA over conditions or penalties can delay resolution of environmental problems. *Id.* at 1095. Second, EPA interference discourages cooperation between the public and the States because of the knowledge that whatever the State decides the EPA may have to be satisfied later. *Id.* at 1096. And third, EPA interference undermines state credibility with the public because the regulated community cannot rely on state permit or other enforcement decisions. *Id.*

The bottom line for Cook is that

> [f]ederal efforts merely duplicate the state's actions by requiring [the regulated entity] to go through a

> second set of negotiations. This new round of negotiations usually produces no additional benefit to the environment.

Id. at 1095.

This is certainly born out in the present case where Cominco must now go through separate permit negotiations with the EPA. And, as Cook suggests, this new round of negotiations is unlikely to produce any additional benefits to the environment as "Low NOx" controls provide the greatest potential for overall emission reductions.

In summary, Cook maintains that when EPA invades the State's enforcement authority it fails to acknowledge the needs and goals of the state program, the regulated public is treated unequally, and resolution of environmental issues is delayed because the State's credibility is eroded. He suggests, moreover, that EPA's goals can be better accomplished through increased cooperation with the States. *Id.* at 1101. Humphrey and Paddock agree. They conclude that when the EPA overrides the States it results in redundant enforcement efforts, introduces uncertainty into the state enforcement program, saps the limited enforcement resources of state and federal agencies, undermines and disrupts the federal-state working relationships, and conflicts with the historical role of the State in addressing environmental problems. *Roles in Environmental Enforcement*, *supra* at 39.

> Twenty years ago, one of the main reasons for an increased federal role in environmental protection was the inadequacy of state programs, including state enforcement. Today, allowing states and, in some cases, local governments, to reassume a greater enforcement role may be the only way to ensure an effective enforcement presence among the tens of thousands of regulated entities that now exist in each state. Strong, well-focused enforcement efforts

> designed to address the varying types of regulated entities in each state are necessary to obtain high levels of voluntary compliance without which the vast regulatory programs will not succeed.

Id. at 36-37.

CONCLUSION

When the EPA invalidates a State's enforcement decision because it would have exercised its discretion differently, it creates distrust between federal and state officials, erodes confidence in state decision-making, nullifies the State enforcement strategy, and is counterproductive. In short, EPA interference with state enforcement efforts, including state BACT determinations, undermines the role of the States, recognized in the CAA, as primary enforcers of federal ambient air quality standards.

For these reasons, this Court should grant the Petition for Writ of Certiorari and overturn the decision below.

DATED: December, 2002.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37, The Center for Energy and Economic Development (CEED) submits this brief *Amicus Curiae* in support of Petitioner State of Alaska. Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.

Amicus, CEED, is a non-profit organization formed by the nation's coal-producing companies, railroads, a number of electric utilities, equipment manufacturers, and related organizations for the purpose of educating the public, including public-sector decision-makers, about the benefits of affordable, reliable, and environmentally compatible coal-fueled electricity. *Amicus* CEED's members are engaged in socially valuable work. That is, they provide essential goods and services that improve and maintain the high quality of life enjoyed in this country.

As demonstrated herein, the implications of Petitioner's case far transcends its individual situation and creates problems of nationwide magnitude. Moreover, *Amicus* believes that the ruling of the Ninth Circuit is inconsistent with a clearly stated legislative act of Congress and is also at odds with the precedents of this Court that recognize the state-federal relationship under the federal Clean Air Act (CAA). Further, under the rule of the Ninth Circuit, tremendous uncertainty has been unnecessarily

---

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

injected into the permitting process for new electrical generation facilities. *Amicus* believes that this uncertainty will unduly interfere with meeting the critical and growing demand for such facilities, as identified by both the Clinton and Bush administrations.

Amicus CEED wishes to underscore the fact that Supreme Court Rule 10.1(c) lists among the considerations governing review on *certiorari*, the circumstance when a United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. *Amicus* CEED submits that both of these grounds for review are present in this case.

OPINIONS BELOW, JURISDICTION, STATUTORY PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Amicus CEED hereby adopts Petitioner's statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision, allowing EPA to usurp the authority that the federal CAA clearly delegates to the States, poses a grave threat to the ability of the States to make Best Available Control Technology (BACT) and other important discretionary decisions under the CAA. Under both the express statutory provisions involved here and the structure of the federal CAA, EPA's actions are an

invasion of the prerogatives left to the states for fashioning individual CAA Prevention of Significant Deterioration (PSD) permits. As such, the Ninth Circuit's decision upholding EPA's desire for "national consistency" is antithetical to the statutory framework created by Congress.

Further, both the Clinton and Bush administrations have determined that more than 1,000 new electricity generation facilities are needed in this country in order to meet future demands. Unless addressed now, the Ninth Circuit's decision will stand as a major obstacle to meeting these critical energy demands, particularly in the several large western states that comprise the Ninth Circuit. The questions presented by this case also involve issues of national importance and call into question the ability of the States to make decisions entrusted to them by Congress to, among other things, ensure both clean air and adequate energy supplies for their citizens. This Court should grant certiorari to resolve the conflict created by the Ninth Circuit's decision in order to preserve the balance of power that Congress enacted under the CAA and to restore greater certainty to a process that must be utilized in order for additional future energy development to occur.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION POSES A GRAVE THREAT TO THE ABILITY OF THE STATES TO ADDRESS A REAL AND GROWING NATIONAL ENERGY CRISIS

Energy and production needs in the future will be local, regional, and national. Recognizing these needs,

Congress gave the States "great flexibility" to achieve the goals of the CAA, *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981), including the ability to allow economic development within the tandem duty of preserving air quality in clean air areas. As the D.C. Circuit explained in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), "[I]n the allocation of responsibilities made by Congress" with respect to preventing the significant deterioration of air quality, "maximum limitations have been set." *Id.* at 364. "These must be observed by the states, but assuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id.*

A State's authority to determine BACT for a particular source is "key" to its ability to "manage [its] allowed internal growth" under the CAA. *Id.* at 364. The "flexible approach" chosen by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as *anticipated and desired economic growth for the area*." S. Rep. No. 95-127, at 31 (emphasis added). Congress's decision to make BACT "strictly a State and local decision," *id.*, makes sense, as it is the States – not the EPA – that are most sensitive to particular local needs and concerns. Further, that Congress required BACT to be determined on a "case-by-case," facility-specific basis, 42 U.S.C. § 7479(3), highlights the importance of such local considerations.

As indicated recently by the current federal administration:

> A fundamental imbalance between supply and demand defines our nation's energy crisis . . . [i]f energy production increases at the same rate as during the last decade our projected energy needs will far outstrip expected levels of production.

See, National Energy Policy, *Report of the National Energy Policy Development Group* (May 2001), p. viii.[2]

> The Clinton Administration found that:
>
> "Before building new capacity, utilities are expected to use other options to meet demand growth – maintenance of existing plants, power imports from Canada and Mexico, and purchases from cogenerators. Even so, assuming an average plant capacity of 300 megawatts, 1,310 new plants with a total of 393 gigawatts of capacity (excluding cogenerators) are projected to be needed by 2020 to meet growing demand and to offset retirements. *Annual Energy Outlook*, Department of Energy, Report #: DOE/EIA-0383 (2001),[3] Energy Information Administration."

The Bush Administration has reached a similar conclusion: "Over the next ten years, demand for electric power is expected to increase by about 25 percent, and more than 200,000 megawatts of new capacity will be required." National Energy Policy, *Report of the National Energy Policy Development Group* (May 2001).

Amicus submits that the Ninth Circuit's decision allowing EPA to dictate BACT to the States, means allowing the EPA to "assume control" of the States' "developing policy choices as to the most practicable and desirable

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[2] Available at http://www.energy.gov/HQPress/releases01/maypr/energy_policy. htm.

[3] Available at http://www/eia.doe.gov/oiaf/archive/aeo01/index.html.

methods of restricting total emissions to a level consistent with" the limitations set out in the CAA. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 80 (1975). As such, the import of the Ninth Circuit's decision is plainly not what Congress intended. *See* S. Rep. No. 95-127, at 32 ("Nothing could be more detrimental to the intent of [the PSD] section and the integrity of [the] act than to have the process encumbered by bureaucratic delay.").

The Ninth Circuit's determination directly threatens the ability of the States to effectively and efficiently permit facilities that will provide the much needed power generation, in the next ten to twenty years. By threatening the States ability to make BACT determinations, and other discretionary state determinations under the CAA, the bureaucratic delays sought to be avoided when authorizing the CAA will become inherent in energy project development. This will have an unnecessary chilling effect on such projects – thereby delaying or prohibiting resolution of critical energy deficiencies. Where, as here, EPA can override the decision of a State permitting authority at any time, even after the public comment period has closed, the permittee has no reason to believe that the permit issued by the state agency has any real meaning or allows construction of the permitted project. As such, the CAA permitting process will become an untenable obstacle to the states in their efforts to address current and growing energy demands.

II. THE NINTH CIRCUIT'S DECISION GROSSLY DISTORTS THE BALANCE OF STATE AND FEDERAL RESPONSIBILITIES SET OUT IN THE STRUCTURE OF THE CLEAN AIR ACT

Congress has declared in the federal Clean Air Act (CAA) that "Air pollution prevention and air pollution

control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(3). Despite Congress' clear emphasis on state primacy, the Ninth Circuit has held that "the EPA has the ultimate authority to decide whether [a] state has complied with the [Best Available Control Technology] BACT requirements of the Act." *Alaska DEC v. EPA*, 298 F.3d 814, 820 (9th Cir. 2002). *Amicus* submits that the Ninth Circuit's flawed decision merits prompt review because that Court has failed to recognize that EPA's authority under the CAA is limited to acting when a State has failed to comply with requirements or prohibitions of the CAA and the requirements to make a BACT determination – a function much different than "ultimate review authority" over discretionary permitting determinations made by the State. See, 42 U.S.C. § 7413 and § 7477.

Further, the Ninth Circuit's flawed decision stands in sharp conflict with decisions of this Court and the lower Courts concerning federal and state division of responsibilities under the CAA. For example, the Supreme Court, in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), addressed whether states could use CAA § 110(a)(3) to seek revisions of State Implementation Plans (SIPs) for the purpose of easing limitations on a single pollution source. This Court held that a state could do that so long as the revised plan would enable the state to attain and maintain national ambient air quality standards (NAAQS). *See, Train*, 421 U.S. at 78. In interpreting CAA § 110, this Court stated:

> "[T]he Act gives *the agency [EPA] no authority to question the wisdom of a state's choices of emissions limitations* if they are part of a plan which satisfies the standards of Section 110(a)(2), and the agency may devise and promulgate a specific plan

> of its own only if a state fails to submit an implementation plan which satisfies those standards. Section 110(c). Thus, *so long as the ultimate effect of a state's choice of emission limitations is in compliance* with the national standards for ambient air, *the state is at liberty to adopt whatever mix* of emission limitations *it deems best suited* to its particular situation." *Train, supra,* 421 U.S. at 79. (emphasis added).

Similarly, in recognition of the primacy of the states' role under the CAA, the Circuit Courts have rebuffed efforts by EPA to mandate specific emission limitations in SIPs. In *Virginia v. EPA,* 108 F.3d 1397 (D.C. Cir. 1997), the D.C. Circuit specifically determined that EPA lacked the authority under CAA § 110 to condition approval of a SIP on the state's adoption of a particular control measure. Further, in *Bethlehem v. Gorsuch,* 742 F.2d 1028, 1036 (7th Cir. 1977) the Seventh Circuit rejected an EPA effort to only partially approve a SIP, thereby rendering the state plan more stringent than the state intended, stating:

> [T]he Clean Air Act creates a partnership between the states and the federal government. The state proposes, though the EPA disposes. The federal government, through the EPA, determines the ends – the standards of air quality – but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through the state implementation plans and timetables of compliance. . . . The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states, . . . especially when, as in this case, the agency is overriding state policy.

The Ninth Circuit's failure to rebuff EPA's usurpation of state authority, which Congress clearly reserved for states like Alaska, stands in sharp conflict with this Court and the several Courts of Appeals' decisions which properly recognize the "division of responsibilities" set out by Congress.

III. THE NINTH CIRCUIT'S DECISION USURPS THE ROLE CONGRESS GAVE TO THE STATES IN PERMITTING NEW ELECTRIC GENERATION FACILITIES UNDER THE CLEAN AIR ACT

Contrary to the statutory flexibility Congress left to State permitting authorities and federal case law defining BACT, the Ninth Circuit determined that EPA was acting within its authority when issuing an order finding that Alaska's BACT determination was not in compliance with the CAA and the Alaska SIP. *Alaska DEC v. EPA*, 298 F.3d 814, at 817.

New Source Review (NSR) is the federal CAA permitting program that regulates the construction of major new stationary sources and major modifications to existing stationary sources. EPA's NSR regulations require such sources to perform health and visibility/air quality impact analyses, install stringent air pollution control equipment, and obtain permits for new construction at major stationary sources. NSR consists of more than one distinct subprogram: PSD is for areas in attainment with health-based National Ambient Air Quality Standards (NAAQS); Non-attainment NSR (NNSR) is for those that are not in attainment with NAAQS.

The current PSD program is set forth in two sets of regulations. One set is 40 CFR 52.21 which is part of the

federal PSD program that applies as part of a federal implementation plan (FIP) for states that do not have an approved PSD program meeting the regulatory requirements of 40 CFR 51.166 – the other set of regulations containing minimum standards for PSD provisions in SIPs. In this and most cases, Alaska has an EPA approved PSD SIP program which delegates authority to the State of Alaska to perform health and visibility and air quality impact analyses, require installation of air pollution control equipment and issue permits under the State administered PSD program.[4]

Among the PSD requirements Congress imposed in the CAA is that the State require application of BACT to any major modification at a major emitting facility subject to the PSD program. 42 U.S.C. § 7475(a)(4). The CAA mandates that BACT limits are to be determined on a case-by-case basis by the permitting authority. As Congress explained, in making this "key decision [BACT] . . . the *State* is to take into account energy, environmental, and economic impacts and other costs of the application of best available control technology. The weight assigned to

[4] Contrary to EPA's actions in this case, the avowed intent of the Bush administration is to simplify the PSD permitting process and allow facilities to more quickly, reasonably, and efficiently make process changes that respond to market place needs and demands. EPA finalized NSR/PSD reforms on December 19, 2002, that are aimed at allowing "sources more flexibility to respond to rapidly changing markets and to plan for future investment in pollution control technologies." Available at http:/www.epa.gov/air/nsr-review/. "The changes are intended to provide greater regulatory certainty, administrative flexibility, and permit streamlining, while ensuring the current level of environmental protection and benefit derived from the program and, in certain respects, resulting in greater environmental protection." *Id.*

such factors is to be determined by the *State*." Sen. Rep. No. 127, 9th Cong., 1st Sess. 31 (1977) reprinted in 3 *1977 Legis. Hist.* at 1405 (emphasis added).[5]

Federal courts have consistently endorsed the statutory requirement that BACT be determined through a flexible, balancing process by the permitting authority. The U.S. Court of Appeals for the District of Columbia Circuit has pointed out, for example, that "BACT is defined, in general, as a level of control technology appropriate to the facts and *circumstances of the particular applicant*." *Alabama Power v. Costle*, 606 F.2d 1068, 1085 (D.C. Cir. 1979) (emphasis added). Previously, the U.S. Court of Appeals for the Ninth Circuit observed that "the BACT determination is . . . *source specific*." *Northern Plains Resource Council v. EPA*, 645 F.2d 1349, 1359 (9th Cir. 1981) (emphasis added). Further, the Ninth Circuit also previously correctly concluded that, while a particular control technology may be BACT for one plant, the permitting authority "might decide that for [another] . . . facility . . . [that technology is] inappropriate for economic *or* energy *or* environmental reasons." *Id.* (emphasis added). *See also*, *Sur Contra La Contaminacion v. EPA, et al.*, 202 F.3d 443, 447 (1st Cir. 2000). Unlike the present decision

[5] *See also 1977 Legis. Hist.* at 729 (emphasis added) ("One objection which has been raised to requiring the use of the best available control technology is that a technology demonstrated to be applicable in one area of the country is not applicable at a new facility in another area because of *difference[s] in feedstock material, plant configuration or other reasons*. For this and other reasons, *the committee voted to permit emission limits based on best available technology on a case-by-case judgment at the State level.* This flexibility should allow such differences to be accommodated and still maximize the use of improved technology."). (emphasis added)

of the Ninth Circuit, court decisions, therefore, confirm what the language of the CAA makes plain: a BACT determination must be made on a case-by-case basis by the State after taking into account energy, environmental, and economic impacts and other costs. Uniformity is not mandated by the BACT provisions; flexibility is.

Despite EPA's objections to the contrary, Alaska did all that was required and more by reviewing the Red Dog Mine application and emission reduction proposals in accordance with the statutory requirements. Alaska's determination was based on a reasoned assessment of the environmental and economic impacts and consideration of all of the CAA § 165 statutory BACT factors. Ironically, the BACT determination made by Alaska also had a greater net environmental and human health benefit than that required by EPA.

IV. THE NINTH CIRCUIT'S FLAWED DECISION RESTS ON NON-BINDING FEDERAL POLICY DIRECTIVES THAT UNLAWFULLY CONSTRAIN CLEAR STATE AUTHORITY

While the Ninth Circuit expressly upheld EPA's Orders vetoing the Alaska-issued PSD permit, *Amicus* wishes to underscore that this case also demonstrates how state authority and discretion in the permitting of new facilities is also subject to increasing erosion through the alarming trend of EPA and the federal land management agencies (*e.g.* National Park Service, U.S. Forest Service) in using "guidance documents" that seek to elevate those agencies' roles in the CAA permitting process at the expense of the states.

The Ninth Circuit correctly observed that Alaska was not bound by EPA guidance documents that have not been subjected to full public notice and comment under the

Administrative Procedure Act. However, the Ninth Circuit nonetheless justified its decision to uphold EPA's Orders based on *its* determination that the low NOx control technology selected was not appropriate under EPA's more than ten year old "draft" guidance document setting forth the "top-down BACT approach." *Alaska DEC v. EPA*, at 10. However, nowhere in the CAA and implementing regulations is there any reference to the "most stringent technology" or the "top-down BACT" approach that the Ninth Circuit relied on in upholding the EPA orders. Notably, the Ninth Circuit did not (and could not) cite any statute, regulation or case law that imposes a legal obligation on an applicant or permitting authority that *requires* the "top down" approach for interpreting and/or applying the statutory BACT factors.[6]

Contrary to the Ninth Circuit's decision, nowhere in the CAA is there any suggestion that certain of the BACT criteria – energy, environmental and economic impacts

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[6] While the Ninth Circuit erroneously relied upon EPA's draft 1990 NSR Manual, the Court should have instead recognized that an agency policy or guidance, unlike a rule, "does not seek to impose, elaborate or interpret a legal norm" and cannot bind an agency (or the State in this case) to a "particular legal policy position." *See, Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994). The Ninth Circuit's decision is thus inconsistent with federal jurisprudence recognizing that when agencies apply guidance in a direct and substantive fashion, federal courts have uniformly set those administrative actions aside and required federal agencies to comply with the notice and comment requirements of § 553 of the federal Administrative Procedure Act (APA). *See, Paralyzed Veterans of America v. D. C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (quoting *Shalala v. Guernsey Memorial Hosp.* 514 U.S. 987, 100 (1995). *See also, Alaska Prof'l Hunters Ass'n v. FAA* 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Caruso v. Blockbuster-Sony Music Entertainment Center*, 174 F.3d 166, 1876-178 (3d Cir. 1999).

and other costs – should be emphasized over others. Further, nowhere in the CAA or implementing regulations is there any indication that BACT limits must be the lowest emission limits that are technically and economically feasible (or technically and economically infeasible, as in this case) for a similar source or source category. Indeed, such an interpretation of the CAA would essentially make BACT limits equivalent to the statutorily *distinct* "lowest achievable emission rate" limits which Congress has imposed *only* on new or modified sources locating in nonattainment areas. *See* 42 U.S.C. § 7501(3). Further, nowhere in the CAA or Alaska SIP is there any presumption that some technology is BACT simply because it has been determined to be BACT for a given type of emission source in another location or for another industry. Congress recognized that the balancing test is mandatory simply because site-specific considerations will warrant emphasis on different considerations. *1977 Legis. Hist.* at 729.

The State of Alaska was required to and did "transmit to the Administrator [EPA] a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to consideration of such permit." See, 42 U.S.C. § 7475(d). The Ninth Circuit stated that "In July 1999, the EPA entered the discussion over Cominco's application at the urging of the National Parks Service, which had expressed concern that the 'nitrogen oxide emissions . . . *could* affect vegetation at Cape Krusenstern National Monument and Noatak National Preserve.'" *Alaska DEC*, at 817. Notably, the speculative comments from the National Park Service (NPS), and the EPA subsequent involvement in the permitting action came

after the close of the public comment period on the proposed permit for the Red Dog Mine.

Under the CAA, FLMs are required to protect the air quality related values of any lands within a *Class I* area and consider whether a major emitting facility will have an adverse impact on such values. See, 42 U.S.C. § 7475(d)(2)(B). However, the CAA neither mandates nor carves out a role for FLMs in Class II areas. The Cape Krusenstern National Monument and the Noatak National Preserve are not mandatory Class I areas and have not been designated Class I areas under the review and recommendation authority of the NPS. Despite EPA and the NPS's late entry into the State of Alaska's administrative process, the Ninth Circuit gave full credence to the administrative alternatives of EPA and the NPS based upon purported authority contained only in agency guidance documents but *not* regulatory provisions.

CONCLUSION

Amicus submits that the Ninth Circuit's opinion is bad law, is injurious to the present and future public welfare, has no place in federal jurisprudence, and merits prompt review.

Respectfully submitted,

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In The
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF NORTH DAKOTA, WYOMING, ALABAMA, DELAWARE, IOWA, MONTANA, NEBRASKA, NEVADA, SOUTH DAKOTA, AND UTAH IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE*

The States of North Dakota, Wyoming, Alabama, Delaware, Iowa, Montana, Nebraska, Nevada, South Dakota, and Utah, as *amici curiae* ("*Amici* States"), respectfully submit this brief in support of the Petition for a Writ of Certiorari filed by the State of Alaska. *Amici* States oppose the decision below of the United States Court of Appeals for the Ninth Circuit, which skews the federal-state partnership envisioned by Congress under the Clean Air Act (the "Act"), 42 U.S.C. §§ 7401, *et seq.*, in general and, in particular, under the Act's Prevention of Significant Deterioration ("PSD") provisions, *id.*, §§ 7470-7479. *Amici* States urge this Court to grant Alaska's petition in order to correct the imbalance wrought by the Ninth Circuit's decision.

INTEREST OF *AMICI CURIAE*

Protection of public health and the environment is of manifest importance to all States. Air pollution affects health and quality of life, and it has both near-to-source and long-range impacts on the environment. As a result, *Amici* States fully support the goals and policies that underlie and are embodied in the Act. At the same time, *Amici* States have an important interest in ensuring that the Act is construed in a way that protects the social and economic well being of their citizens, as well as their public health and welfare.

The Act recognizes and respects the tension that can arise between environmental protection and social and economic impacts on a community. Congress expressly reserved to the States the role of balancing those

competing concerns under the Act's PSD provisions, which apply in "clean air" areas of the country. The Act requires new sources of pollutant emissions to use Best Available Control Technology ("BACT") in areas where air quality is already better than the National Ambient Air Quality Standards (the "NAAQS"). In the statutory definition of BACT, Congress provided that the States must exercise their discretion to decide what constitutes BACT for a particular source. 42 U.S.C. § 7479(3). Nowhere in the language or the structure of the Act, or in its legislative history, did Congress state or imply that State BACT determinations are merely preliminary. Yet the Ninth Circuit erroneously held that such BACT decisions are only "initial," and that they are subject to EPA's "ultimate" authority to disagree and override States' determinations. App. at 10a-11a. *Amici* States have a compelling interest in protecting their authority under the Act, including fulfilling their primary role of weighing the statutory BACT factors in implementing their respective PSD programs. The Ninth Circuit's decision strips the State of Alaska of that role, and *Amici* States fear that EPA will attempt to wrest from them, too, their responsibility for BACT determinations, relegating state environmental agencies to the role of EPA branch offices.

Amici States also have an interest in promoting the orderly function of their respective administrative decision-making processes under the PSD program and generally under the Act. Beyond their common interest in making correct decisions under their PSD programs, they also care about the wise and efficient use of state resources dedicated to those programs. When Congress granted EPA authority to issue enforcement orders for violations of "requirements" of a State Implementation

Plan ("SIP") or the Act's PSD provisions, 42 U.S.C. §§ 7413(a)(5), 7477, it did not intend EPA to use that limited authority as a substitute for participation in and respect for the State's PSD permitting process. Yet, in this case EPA declined to challenge Alaska's BACT determination at the state administrative level, thereby denying Alaska the chance to develop a complete administrative record in support of its BACT decision, and instead presented the BACT question to a federal court of appeals on an incompletely-developed state administrative record. *Amici* States have a strong interest in avoiding this emasculation of their administrative process and waste of state resources in future PSD permitting proceedings.

For these reasons, *Amici* States file this brief in support of the State of Alaska's petition.

REASONS FOR GRANTING THE PETITION

I. Congress Expressly Reserved To The States Specific Authority Under The Clean Air Act

In the Act, Congress assigned distinct roles to the federal and state governments. A key federal role is the promulgation of the NAAQS, which define the amount of pollutants that may be emitted in a given area without harming public health and welfare. 42 U.S.C. § 7409. Despite EPA's responsibility for setting the NAAQS, which apply nationally, the Act makes clear that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Thus, the States, through their approved SIPs, are charged with implementation of the

federally-set NAAQS. *Id.* § 7410. As this Court has recognized, "Congress plainly left with the States, so long as the [NAAQS] were met, the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co. v. E.P.A.*, 427 U.S. 246, 269 (1976); *see also Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975).

Congress also gave the federal and state governments distinct functions in the implementation of the Act's PSD program. EPA sets the allowable increments that may be consumed for a particular regulated pollutant. 42 U.S.C. § 7476(a). The States, meanwhile, determine the areas in which the increments will apply, and provide for non-exceedence of the increments through their SIPs. *Id.* § 7474(a); 40 C.F.R. § 51.166(a) (1999). EPA "is without authority to dictate to the States their policy for management of the consumption of allowable [PSD] increments." *Alabama Power Co. v. Costle*, 636 F.2d 323, 361 (D.C. Cir. 1980). Rather, "assuming compliance" with the maximum limitations defined by EPA through the increments, "growth-management decisions were left by Congress for resolution by the states." *Id.* at 364.

When Congress gave the States responsibility for managing the PSD increments, it acted consistently with EPA's own earlier judgment that implementing the PSD program is uniquely local in nature:

> Any policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used. Traditionally, these land use decisions have been considered the prerogative of local and State governments, and . . . the primary opportunity of making these

> decisions is reserved for the States and local governments. . . . In the Administrator's judgment, this matter should not be handled at the Federal level,. . . .

39 Fed. Reg. 31000, 31001 (1974). Almost twenty years later, EPA confirmed its perception of the States' ultimate responsibility to implement the PSD program:

> [I]t is the state that must make the final decision on all issues relating to the specific [PSD] permit. There is no suggestion in the Act's NSR [New Source Review] provisions that EPA has authority to second-guess the state on matters that are a lawful and rational exercise of discretion properly conferred upon the state. . . .

EPA OFFICE OF GEN. COUNSEL ["OGC"] LEGAL OP., *EPA Enforcement Authority with Respect to Sources Based on a Finding of a State's Failure to Comply with New Source Requirements*, at 2 (Jan. 22, 1993), AS App. at 3.[1]

Not surprisingly in light of the Act's allocation to state and local governments of responsibility for "air pollution prevention . . . and air pollution control at its source," 42 U.S.C. § 7401(a)(3), Congress also charged those States with EPA-approved SIPs with responsibility for BACT determinations. The Act defines BACT as "an emission limitation . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental,

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[1] Citations to "AS App." refer to *Amici* States' appendix, which is bound with this brief. Citations to "App." refer to the appendix that accompanied the petition in this docket.

and economic impacts and other costs, determines is achievable for such facility. . ." 42 U.S.C. § 7479(3); *see also* 40 C.F.R. § 51.166(b)(12) (1999).[2]

Beyond making clear that States – not EPA – would select BACT, the Act's BACT definition confirms that the determination is a discretionary one, based on the statutory factors. 42 U.S.C. § 7479(3). While the Act defines the factors that States must consider, the ultimate selection of BACT is a judgment call by the States, and there is no one "correct" BACT for a given source. As stated best by EPA itself, "the state remains free to exercise informed judgment in making the determinations" required for PSD permits, including the selection of BACT. OGC LEGAL OP. at 2, AS App. at 4. "[I]f a state has met all procedural norms, considered all available control technologies, and given a reasoned justification of the basis for its [BACT] decision, EPA has no grounds on which to challenge a final substantive state decision that does not violate such objective standards." *Id.* at 5. That is precisely what Congress was thinking when it enacted the PSD provisions: "The decision regarding the actual implementation of best available technology is a key one, and the [Act] places this responsibility with the State, to be determined in a case-by-case judgment." S. REP. NO. 127, 95th Cong., 1st Sess. 31 (1977). Moreover, "the phrase [BACT] has broad flexibility in how it should and can be interpreted, depending on site." *Id.*

[2] States with approved SIPs are the "permitting authorit[ies]" under 42 U.S.C. § 7479(3).

Thus, the plain language of the statute, its legislative history, decisions of this Court and lower federal courts, and EPA's own interpretations of the PSD provisions confirm beyond doubt that States must determine BACT for a particular source, and must exercise discretion in that process. As is true with implementing the NAAQS and other authority under the Act that Congress expressly reserved to the States, EPA lacks the power to question the wisdom of a State's BACT determination, so long as that State determination protects the federally-set increments and was made based on the statutory factors and the state's EPA-approved SIP.

II. EPA May Not Usurp Reserved State Authority Through Enforcement Orders

Here, the State of Alaska exercised its authority to determine BACT in accordance with the Act. Alaska considered a variety of possible technologies in light of the statutory factors listed in 42 U.S.C. § 7479(3); it engaged in a lengthy dialogue with the permit applicant, EPA, and other interested parties; it independently researched the pros and cons of the many potentially available technologies; it prepared preliminary, draft, and final technical analysis reports; and it ultimately selected a technology known as "Low NOx" as BACT.

Where did Alaska go wrong? Stated plainly, it selected a technology different from the one that EPA favored – selective catalytic reduction or "SCR." EPA, offended by Alaska's failure to march in step, responded by issuing a series of enforcement orders under Sections 113(a)(5) and 167 of the Act. Section 113(a)(5) permits EPA to issue

orders prohibiting the construction of new sources or the modification of existing sources when the EPA Administrator "finds that a State is not acting in compliance with any requirement or prohibition of the Act" relating to such construction or modification. 42 U.S.C. § 7413(a)(5)(A). Section 167 permits orders "as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements" of the PSD provisions. *Id.* § 7477.

EPA asserted, and the Ninth Circuit accepted, that the Act's enforcement provisions in 42 U.S.C. § 7413(a)(5)(A) and § 7477 vest EPA with broad authority to use enforcement orders to override a State's selection of BACT whenever EPA disagrees with the State's "improper determination." App. at 10a. The Ninth Circuit reasoned as follows: (a) Subjecting a facility to BACT is a "requirement" of the Act and its PSD sub-part, *id.* at 8a; (b) when EPA disagreed with Alaska's choice of Low NOx as BACT, it concluded that Alaska "had not complied with the BACT requirement," *id.* at 9a; and (3) *ergo*, EPA could invoke its enforcement powers to override the Alaska decision, *id.* at 10a-11a. On this basis, the Ninth Circuit held that Alaska "made the initial BACT decision," *id.* at 9a, but "EPA has the ultimate authority" to determine BACT, *id.* at 10a-11a.

The Ninth Circuit's logic, however, is overly simplistic and fatally flawed. It assumes that the "requirement" of the Act, for purposes of 42 U.S.C. § 7413(a)(5)(A) and § 7477, is the choice of one particular technology as BACT, when, in fact, the Act requires only that a State undertake a BACT analysis and select the technology that the State deems appropriate in light of the statutory factors (and one that protects the increment). The State's chosen

technology might or might not coincide with EPA's choice of BACT, if EPA were the decision-maker. The point, however, is that EPA is *not* the decision-maker under 42 U.S.C. § 7479(3). The Ninth Circuit essentially ignored that section, which, by defining BACT as a discretionary State judgment, necessarily defines what the BACT "requirement" is under the Act. Yet, the Ninth Circuit inexplicably concluded that "[n]othing in the BACT definition of 42 U.S.C. § 7479(3) limits the EPA's authority." App. at 11a.

The Ninth Circuit held that "[t]he structure and legislative history of the Act" further support the court's endorsement of a radical shift in power from the States to EPA App. 9a. The court reviewed various amendments to the Act since its original enactment in 1963, concluding that "[f]ollowing disappointing state response to air pollution concerns, Congress has consistently increased over time federal authority in pollution control." *Id. Amici* States do not dispute the legislative events that the decision below summarizes; they do, however, challenge the relevance of those events to the issue here, *i.e.*, whether EPA may use enforcement orders to divest States of the discretion that Congress vested in them to make BACT determinations.

For example, the fact that in 1970 Congress directed EPA to publish NAAQS and directed the States to develop SIPs to meet the NAAQS, *see id.*, has no bearing on the then-non-existent PSD program; the federal concern in 1970 over "dirty air" areas was distinct from the later focus of the PSD program on preserving "clean air" areas. Moreover, as discussed *supra* at pp. 3-4, but ignored by the Ninth Circuit Congress expressly allocated authority to implement the NAAQS to the States. Similarly, the

"internal industry 'pressure'" referred to by the Ninth Circuit as one basis for Congress's adoption of the PSD provisions in 1977, App. 10a (quoting legislative history), resulted in federally-set maximum increments, but *not* federal control over the implementation of the PSD program; rather, Congress specifically gave that responsibility to the States. *See supra* at p. 4.

Missing from the Ninth Circuit's analysis of the Act's historical development are the most important points of all – acknowledgments that (a) in 1977 Congress unambiguously gave the States the primary authority to implement the PSD program, including BACT determinations, and (b) Congress has not reduced that authority since 1977. Indeed, EPA concluded in 1993 – *after* the legislative events on which the Ninth Circuit relies for its anti-state-authority premise – that "[t]here is no suggestion . . . that EPA has authority to second-guess the state on matters that are a lawful and rational exercise of discretion properly conferred upon the state. . . ." OGC OP. at 2, AS App. 3.

Under the Ninth Circuit's decision, EPA is in complete control of a State's air program, both under the PSD provisions (to which Section 167 applies) and under a state's SIP in general (to which Section 113(a)(5) applies). No matter that Congress specifically allocated authority to the States – EPA's enforcement authority trumps that State authority. No matter that the particular issue calls for the exercise of discretion and that the Act does not require one objectively-definable outcome – if EPA disagrees with the State's subjective analysis, it may steamroll the State through the exercise of its "ultimate" enforcement authority.

III. The Ninth Circuit Decision Will Harm State Air Programs And Interests

Beyond its substantive deficiencies, the Ninth Circuit decision will have an enormous effect on all States, including the *Amici* States, as they attempt to implement their air programs. The essential holding of the Ninth Circuit decision is that the Act gives the States only "initial responsibility" for PSD permitting decisions, but that "EPA has the ultimate authority to decide" BACT. App. 10a-11a. This sweeping pronouncement, based on an unduly-broad construction of the word "requirement" in 42 U.S.C. § 7413(a)(5)(A) and § 7477 relegates state programs to mere preliminary involvement with no substantial decision-making power. State authority to determine BACT, and likely with respect to other discretionary decisions under the Act as well, is rendered a mere illusion.

The impact of this restriction on States' authority is obvious. *First*, permit applicants will be left with uncertainty whether and when EPA will choose to inject itself into the state permitting process, and whether they can participate in that process with confidence; that uncertainty, in turn, will frustrate growth, thereby depriving the States of control over the "growth management decisions" that Congress specifically "left . . . for resolution by the states." *Alabama Power*, 636 F.3d at 364. *Second*, applicants will see scant value in working meaningfully with the States on BACT and other determinations under the Act, because they will know that EPA will be the ultimate decision-maker. *Third*, the administrative process will be thrown into disarray: state administrative procedures for hearings on and review of permitting decisions will be rendered superfluous as

applicants work directly with EPA instead of through State air programs; and absent defined procedures, there will be no useful administrative records, which (as in this case) will make EPA's determinations virtually unreviewable.

Congress did not intend these results when it made permit-specific decisions the province of the States, so long as the States apply the statutory factors stated in 42 U.S.C. § 7479(3), follow the requirements incorporated into their federally enforceable SIP, and protect the increments from over-consumption. The Ninth Circuit's decision – its acceptance of EPA's effort to bootstrap a difference of opinion into a violation of law – turns the Clean Air Act on its head.

CONCLUSION

Because both the analysis and conclusion in the decision below are flawed, *Amici* States urge this Court to grant the State of Alaska's Petition for a Writ of *Certiorari* and to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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January 2, 2003

(LOGO) UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 22 1993

OFFICE OF
GENERAL COUNCIL

MEMORANDUM

SUBJECT: EPA Enforcement Authority with Respect to Sources Based on a Finding of a State's Failure to Comply with New Source Requirements: The Effect of the 1990 Amendments
LEGAL OPINION

FROM: Raymond J. Luduiazanski
Acting General Counsel

TO: Scott Fulton
Acting Assistant Administrator for
Enforcement

ISSUE: Whether the 1990 Amendments to the Clean Air Act (CAA) section 113(a)(5) provide authority for EPA to take enforcement action against a source when EPA finds that a permit issued by a state does not comply with the new source review requirements to prevent significant deterioration (PSD) of air quality in attainment areas under Part C of Title I of the CIA?

ANSWER: Section 113(a)(5) as amended gives EPA authority to take enforcement action against a source with a state-issued permit that does not comply with PSD new source review requirements, and thus provides enforcement authority similar to that which already exists under that section with respect to state-issued permits that do not comply with new

source review (NSR) in attainment areas under Part D of Title I of the CAA.

DISCUSSION:

I. Introduction

The Clean Air Act (CAA), 42 USC § 7401 *et. seq.*, as amended in 1977, authorized civil enforcement action and administrative compliance orders with respect to major stationary sources based on a finding that a state "is not acting in compliance" with "any plan provisions" that require new sources to obtain a new source review (NSR) permit in nonattainment areas. Section 113(a)(5)-549, have revised and expanded this EPA authority. This memorandum is in response to a request from the Office of Enforcement for a legal opinion addressing whether the amended section provides authority to EPA to take enforcement action, based on a finding of state noncompliance, with respect to sources subject to new source-review requirements in *attainment* areas, as well as sources in *nonattainment* areas. The Office of Enforcement also seeks advice on whether the Amendments affect the proper parties to any enforcement action and the circumstances in which an action may be brought. The Office of Enforcement plans to issue revised enforcement guidelines with respect to its authority under this section which will identify the Agency position on the policy matters.

II. Background

There are two principal new source review programs under the Clean Air Act calling for the preconstruction review and permitting of major stationary sources and major modifications to existing sources of air pollution.

The nonattainment NSR requirements in Part D of Title I apply in areas designated as nonattainment under section 107 of the Act, while the prevention of significant deterioration (PSD) requirements under Part C apply in all other areas.[1]

As with all SIP programs – Congress envisioned that states would play the primary role in enforcing the nonattainment and PSD new source review programs. *See* sections 101(a)(1), 110(a)(2)(C), 161, and 172(b)(5) of the Act. However, it is also clear that Congress intended EPA to play an important oversight and enforcement role. This intent is manifest in the numerous and detailed federal enforcement provisions affecting NSR in sections 107 and especially 113 that are discussed below.

EPA follows two general principles in reconciling the tensions between the state and federal responsibilities in the administration of NSR programs. First, it is the state that must make the final decision on all issues relating to the specific permit. There is no suggestion in the Act's NSR provisions that EPA has authority to second-guess the states on matters that are a lawful and rational exercise of discretion properly conferred upon the state. Second, and conversely, EPA is the agency with primary responsibility to interpret the federal law. In so doing,

[1] Parts C and D were added to the Clean Air Act by the Clean Air Act Amendments of 1977. In addition, the 1977 Amendments revised section 110(a)(2)(D) to require a rudimentary review of any new source or modification without regard to size. This so-called general or minor NSR program was revised again and recodified as section 110(a)(2)(C) by the 1000 Amendments. It is implemented by EPA regulations at 40 CFR 51-160-164 and the SID of the various states.

EPA acts to ensure that the state exercises its discretion within the bounds of the law and otherwise acts in accordance with applicable statutory and regulatory norms. In carrying out these principles, it is apparent that EPA acts largely as a guarantor that the state follow applicable procedures and not act arbitrarily or violate any objective standards that may apply, while the state remains free to exercise informed judgment in making the determinations. *See* Conference Report on Clean Air Amendments of 1977, H.R. Rep. No. 95-564, 95th Cong., 1st Sess., *reprinted in* 3 *Legislative History of the Clean Air Act Amendments of 1977* (*Legislative History*) 533 ("The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit."); Senate Report No. 95-127, p. 31, 36 (1977), *reprinted in* 3 *Legislative History* 1405, 1410 ("The decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility with the State, to be determined in a case-by-case judgment." (p. 1405), and "The committee intends a sharply restricted role for the (EPA) in regard to implementing the policy to prevent significant deterioration. EPA is limited to ... seeking injunctive relief or other measures that would be necessary to prevent the issuing of a permit for a new source if it does not comply with the requirements of the subsection." (p. 1410)).[2]

[2] The Legislative History specifically discussed the permit program for PSD. There is no reason to believe that the discussion is not also fully applicable to the NSR permit program in nonattainment areas enacted at the same time.

In implementing these principles, EPA must strike a balance between infringing on state discretion, and preventing or remedying unlawful permits. For example, EPA is authorized to inquire into whether the state violated applicable procedures or acted arbitrarily in reaching its decision on lowest achievable emission rate (LAER) under section 173(2), such as by ignoring SIP limits in other states that are more stringent than the limits reflected in the permit in question. On the other hand, in the case of a decision applying best available control technology (BACT) under section 166(a)(4) for PSD, if a state has met all procedural norms, considered all available control technologies, and given a reasoned justification of the basis for its decision, EPA has no grounds on which to challenge a final substantive state decision that does not violate such objective standards. These principles and the demarcations of EPA's enforcement authority have been set out in EPA's approval of state PSD programs, *see, e. g.*, 57 Fed. Reg. 28093, 28095 (1992) and in enforcement guidance, *Memorandum*, "Procedures for EPA to address Deficient New Source Permits Under the Clean Air Act," from Michael S. Alushin, Associate Enforcement Counsel for Air, and John S. Seitz, Director, Stationary Sources Compliance Division (July 15, 1988) ("Deficient Permit Guidance").

II. Applicability of Section 113(a)(5) to New Source Review.

A. The 1977 Act.

Section 113(a)(5), as enacted in 1977, provided:

> Whenever, on the basis of information available to him, *the Administrator finds that a State is not acting in compliance with any requirement of* the

regulation referred to in section 129(a)(1) of the Clean Air Act Amendments of 1977 (relating to certain interpretative regulations) or *any plan provisions required under section 7410(a)(2)(I) of this title and part D* of this subchapter . . . *he may issue an order prohibiting the construction or modification of any major stationary source in any area to which such provisions apply or he may bring a civil action under subsection (b)(5) of this section*. (Emphasis added).

Under section 113(a)(5) as it appeared in the 1977 Amendments, the 95th Congress authorized EPA both to issue general construction bans or to take enforcement action regarding a specific source when EPA has made a finding that the state is not acting in compliance with any requirements under Part D with respect to the construction or modification of a major stationary source. EPA's construction ban authority under § 113(a)(5) is not, however, the focus of this memorandum. But *See, e.g.*, 44 Fed. Reg. 20372, 20380 (1979) (general preamble for approval of SIPs under 1977 Amendments); 57 Fed. Reg. 13498, 13552, 13555-56 (general preamble for approval of SIPs under 1990 Amendments) (section 113(a)(5) now authorizes construction bans in attainment as well as nonattainment areas).

EPA has also interpreted section 113(a)(5) to permit action against a source to prevent construction or modification pursuant to a specific state-approved NSR permit that, while arguably valid on its face, EPA has found to be deficient in meeting the applicable statutory or regulatory requirements.

Before the 1990 Amendments, EPA could challenge deficient state-issued PSD permits in attainment areas

under §§ 113(a)(1), 113(b)(1) or 167 but not under section 113(a)(5). The scope of EPA's PSD enforcement authority under the 1977 amendments is addressed in only one reported decision, *United States v. Solar Turbines*, 732 F.Supp. 535 (M.D. Pa. 1989). In that case, the court held that sections 113(a)(1), (b)(1) and 167: did not authorize EPA enforcement action solely against a source when the source had been issued a state permit under Part C allowing the construction or modification, unless the source had violated "objective standards."

Instead, the court found that EPA would have to take action against the state where the source itself had violated no "objective standards." *See, id.* at 539-40. According to the court, action against the state to remedy permit deficiencies could be taken under section 167, or in an enforcement action arising under section 113(a)(1), or, in a nonattainment area, under section 113(a)(5). *Id.* at 537, 539-40 (citing *United States v. Ohio Department of Highway Safety*, 635 F.2d 1195, 1203 (6th Cir. 1980)).[3] The court did not discuss whether enforcement action could be brought against both the state and the source for a violation of the provisions. EPA has stated, with respect to that decision, that if a state-issued permit does not conform to the Act's PSD requirements, EPA will decide "whether to sue the state and/or the source." 55 Fed. Reg. 23547, 23548

[3] The Sixth Circuit held that a state is subject to the enforcement procedures of section 113(a)(1) as a "person" under the Act when the state fails to perform a duty reasonably required of the state under the implementation plan. In that case, the state failed to deny registration to motor vehicles that did not pass inspection and maintenance omission tests, as required in the federally-promulgated provisions of the implementation plan.

(June 11, 1990) (notice of clarification regarding approval of Kentucky's PSD program).

B. The 1990 Amendments.

The 1990 Amendments to section 113(a)(5) (Pub L. 101-549, section 701) have given EPA enforcement authority with respect to all new source review requirements; not solely those under Part D and related provisions that are applicable only in designated nonattainment areas. The revised language also refers to a finding of noncompliance with "any requirement or prohibition of the Act" relating to the construction or modification of new sources, rather than with only a "plan provision" or other specified provisions of the Act.

Section 113(a)(5) now provides:

> Whenever, on the basis of *any* available information, the Administrator finds that a State is not acting in compliance with any requirement *or prohibition of the Act relating to the construction of new sources* or *the modification of existing sources, the Administrator* may –
>
> (*A*) issue an order prohibiting the construction or modification of any major stationary source in *an* area to which such *requirement* applies;
>
> (*B*) *issue an administration penalty order in accordance with subsection (d), or*
>
> (*C*) bring a civil action under subsection (b).
> (Emphasis added to indicate new language.)

Judicial action to enforce section 113(a)(5) continues to be authorized, as was the case under the 1977 Amendments, pursuant to subsection (b)(3), as follows:

> The Administrator shall, as appropriate, in the case of any person that is the owner or operator of . . . a major emitting facility, or a major stationary source . . . commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, . . .
>
> (3) Whenever such person attempts to construct or modify a major source in any area with respect to which a finding under subsection (a)(5) has been made.

By replacing the specific references to noncompliance with section 129 (relating to the emissions offset interpretative ruling in 40 CFR Part 51, Appendix S) and SIPs under Part D in section 113(a)(5), as enacted in 1977, with references in the 1990 Amendments to noncompliance with new source review requirements generally, Congress has provided EPA with authority to prevent construction and modification of major sources in both attainment and nonattainment areas based on a finding of a state failure to comply with either statutory or regulatory requirements.

The legislative history of the 1990 Amendments makes clear that the amended provisions of section 113(a)(5) were intended to apply to new source review for PSD in attainment areas under Part C, as well as to NSR in nonattainment areas under Part D. The House bill specifically referred to findings of noncompliance – "with any requirement of Part C or Part D." H.R. 3030. Section 601. The House Committee Report also states with respect to the provision that became section 113(a)(5):

> *Failure to comply with Part C or Part D of title I* – This paragraph of subsection (a) authorizes enforcement actions where a State is not acting in compliance with any requirement of Part C or Part D of Title I. H.R. Rept. No. 101-490, Pt. 1, P. 391.[4]

The extension of the 1990 Amendments to include PSD permits in attainment areas within the scope of section 113(a)(5) makes EPA enforcement action against these source [sic] appropriate to the same extent as is the case when EPA finds that a state is not acting in compliance with any requirements or prohibition of the Act governing new sources in nonattainment areas. The court in *Solar Turbines* recognized that EPA had enforcement authority to take action against a source in a nonattainment area when a finding had been made under section 113(a)(5). The court stated that EPA may take enforcement action "when after a finding has been made that a State is not acting in compliance with the Act's *non* attainment [sic] provisions, an owner/operator persists in

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[4] In discussing the related enforcement provisions in section 113(b) of the final bill, Senators Chafee and Baucus, two of the Senate Conference managers stated:

> The agreement also adopts the House language making clear that [enforcement actions] can also be brought whenever an owner or operator is attempting to construct or modify a major stationary source in violation of new source requirements. 136 Cong. Record S 16950 (Oct. 27, 1990).

Thus, these Senate Conference managers agreed with the House Committee Report that enforcement actions could be brought against a specific source whenever a finding under subsection (a)(5) has been made with respect to any new source requirement. There is no contrary legislative history.

attempting to construct in violation of that finding." 732 F. Supp. at 537 (emphasis in original).

Like the court in *Solar Turbines*, EPA has interpreted section 113(a)(5), as enacted in 1977, to permit enforcement action against a source with a state-issued permit based on a finding of state failure to comply with the applicable nonattainment requirements.

The 1990 Amendments strengths EPA's position. As noted above, section 113(a)(5) as revised clarifies that enforcement action may be based on a finding of state failure to comply with "any requirement or prohibition" of the Act relating to new sources, and not only failure to comply with "plan provisions" or the offset Ruling in 40 CFR Part 51, Appendix S. Congress has thus clarified that a state failure to conform to the underlying statutory requirements regarding new source review, as well as state noncompliance with the terms of a SIP implementing those requirements, may provide a basis for action under section 113(a)(5). This revision reaffirms that the underlying congressional concern is that new sources be constructed in compliance with the statutory requirements, and not solely that the source comply with the SIP plan provisions as interpreted and applied by the state. Thus, where a state fails to submit timely SIP revisions under the 1990 Amendments, EPA may use section 113(a)(5) to insure that new source permitting by the state conforms to the amended statutory requirements during the period prior to adopting of revised implementation plan [sic]. *See* 57 Fed. Reg. 13555-56.

III. Proper Parties in Actions Based on Section 113(a)(5) Findings.

As discussed below, the statute is clear that EPA may maintain enforcement proceedings against a source under section 113(a)(5). The statute does not require that the state be joined as a party in such proceedings. This is the position EPA has taken in the past. Deficient Permit Guidelines, *supra*, p. 8.

The 1990 Amendments do not contain any new provisions bearing on the proper parties. Section 113(a)(5) and the related enforcement provisions, as found in both the 1977 and 1990 Amendments, on their face contemplate the enforcement action being brought against the source.

> *"[t]he Administrator shall in the case of any person which is the owner of an affected major source . . . and may, in the case of any other person, commence a civil action . . .*
>
> (3) *Whenever such person* . . . attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) has been made. (Emphasis added.)

This language leaves the Agency with discretion whether to join the state as a party in an enforcement action against a source based on a finding of a state failure to comply. As noted above, enforcement action against the state has been found to be permissible under other provisions of Title I. *United States v. Ohio Department of Highway Safety, supra; see also Solar Turbines,* 732 F. Supp. at 540. Although the statute plainly allows EPA to proceed against a source as sole defendant as a matter of law, it would be prudent to join the state as well in most

cases. This will prevent sources from asserting as an equitable defense that EPA has failed to join a state that is the "responsible" party because it issued the allegedly deficient permit at issue.

The 1990 amendments do not specify how the Administrator's finding of noncompliance by a state is to be made. EPA's Deficient Permit Guidelines provide a model Finding of Violation to the state. The model Finding of Violation gives the basis for the finding of noncompliance, and a copy is provided to the state and the source. Deficient Permit Guidance, Appendix 3. The document states that it serves to provide an opportunity to confer with EPA prior to initiation of civil action, but without any waiver of EPA's right to commence action immediately. Under the EPA Deficient Permit Guidelines, section V. B., EPA is to "keep the source informed of all EPA's attempts to convince the permitting agency to change the permit." This policy is important as a matter of equity in providing assurance that the source is on notice of EPA's position before any non-complying permit is issued.

IV. Action Against Operating Sources.

The Office of Enforcement seeks advice on whether enforcement action to implement section 113(a)(5) is limited to sources that are being, or may soon be, constructed or modified, or whether action may also be taken with respect to a source already in operation. Section 113(a)(5) states that the Administrator may "issue an order prohibiting the construction or modification" of any source. The related enforcement provisions in section 113(b)(3), and (d)(1)(C), authorize action when a person "attempts to construct or modify a major stationary source." These

provisions are focused on construction in progress or in the future, and might be read to exclude enforcement against sources that have already begun operation.

The better reading of section 113(a)(5) – and certainly a reasonable one – is that EPA is not precluded from taking enforcement action simply because the source has been able to commence construction, and even operation, before EPA has had a chance to discover the violation and act upon it. This interpretation is supported by the legislative history of the 1990 Amendments.[5] Likewise, judicial enforcement action and administrative penalties are not barred if, following EPA's comments during a state-permitting proceeding or issuance of a Notice of Violation or administrative order, a source manages to complete construction or modification and begin operation prior to

[5] The Senate bill expressly provided for enforcement against the operation of a non-complying source. S. 1630, section 601(g). This provision was not included in the final 1990 Amendments, apparently because the agency was found to already have appropriate authority. Senators Baucus and Chafee, two of the Senate Conference managers, stated their view that the intent of the conference agreement was to:

> preserve the current interpretation of the EPA that it can prohibit the operation of a source upon *discovery* that such source is operating in violation of new source requirements. Indeed, it is particularly important that the EPA be allowed to take enforcement action against operating sources that have circumvented new source review requirements. . . .
>
> We note that EPA has been judicious in the use of this authority to date, and we would encourage the Agency to continue to exercise its discretion with some restraint in this area. 136 Cong. Record, S. 16951 (Oct. 27, 1990) (emphasis added).

the filing of a civil action or commencement of an administrative penalty proceeding. EPA's existing guidelines urge the Agency to act promptly upon the discovery of noncompliance, and EPA has interpreted the provisions as allowing enforcement action even if operations have started. *See* Deficient Permit Guidelines, pp. 1, 2 and 4.

Given the underlying statutory purposes, this guidance is proper. Section 113(a)(5) and the related provisions of section 113(a)(1), (b)(1), (b)(3) and section 167 are plainly intended to grant EPA adequate enforcement authority to ensure that new or modified, major stationary sources follow the new source review requirements of the Act. That statutory purpose would be undermined if new or modified sources were insulated from compliance with the statutory requirements merely because EPA did not discover and fully act upon such noncompliance prior to the beginning of operations at the new or modified source. Moreover, beginning operations does not cure the ongoing violation of the underlying provisions of the Act and applicable regulations and SIPs. That is, it does not change the fact that the new source or modification was constructed without a permit that conforms to the requirements of the Act. As discussed above, those provisions obligate states to issue, and sources to construct in accordance with, new source review permits that conform to the substantive and procedural requirements of the new source review program. It is worth noting, however, that upon issuance of a facially valid permit, substantial

equities begin building on behalf of the holder of that permit. Deficient Permit Guidance at 2.[6]

[6] Many of the issues discussed in this memorandum were addressed in a recent district court decision, *United States v. AM General Corp.*, Civ. No. S87-00377 (N.D. Ind.), slip op. Dec. 14, 1992. In that case, the court upheld EPA's position on several points, but granted summary judgment for the defendant based upon the timing of EPA's claim. *AM General* involved an EPA finding that a major stationary source had violated the Clean Air Act by modifying its operations based upon a facially valid Part D permit issued by the state that did not conform to the Act's NSR requirements. First, the court properly found that mere possession of a facially valid permit does not shield the source from enforcement action and that EPA has authority to bring an enforcement case under section 113 without exhausting state administrative or judicial remedies when a state issues a permit that fails to conform to the Act's requirements. *AM General*, slip op. at 15-16, 23. The court also found, however, that in order to maintain such an action, EPA must as a matter of law, issue a finding of violation to the state alleging permit deficiencies *before* the source constructs or modifies in reliance on the state permit. *Id.* at 24-25. EPA believes this decision was erroneous in certain key respects and has filed a motion for reconsideration, which is pending. Regardless of the final outcome, however, *AM General* suggests that EPA may want to reconsider aspects of its NSR enforcement policy, as the case underscores a pattern of judicial misunderstanding of those policies. The staff of the Office of General Counsel would be happy to assist in any such effort.

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In the

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Clean Air Act, can the EPA override a state permit decision when the state is authorized to carry out its own air pollution program and the permit does not violate any federal pollution standard?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, State of Alaska.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. PLF was founded in 1973 and provides a voice in the courts for mainstream Americans who believe in limited government, individual rights, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF supports a broad view of the public interest and promotes balance and common sense in the administration of laws and regulations.

There is an alarming trend among federal agencies and in the courts to expand the enforcement power of the federal government by adopting statutory interpretations that cannot be squared with the plain meaning of the act, the intent of Congress, or constitutional principles of federalism. This case is a singular example of government overreaching.

The Ninth Circuit has held that the Environmental Protection Agency (EPA) may override a discretionary permit decision of a state, under a federally-approved state air pollution program, without a showing that the permitted activity will violate any federal air quality standard. That decision defies common sense and undermines the intent of Congress as expressed in the Clean Air Act (CAA) to rely on the states to ensure local air quality.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF has a long history of amicus participation in environmental cases before this Court. For example, PLF was an amicus participant in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). PLF believes its public policy perspective will provide a necessary viewpoint in this case.

STATEMENT OF THE CASE

Teck Cominco Alaska, Inc. (Cominco), owns and operates a mine, known as the Red Dog Mine, in the State of Alaska in partnership with the Northwest Arctic Native Association. The mine sits on Association property 100 miles above the Arctic Circle in a remote part of the state. It is the largest zinc concentrate producer in the world. The closest residential communities are the native villages of Kivalina and Noatak. The mine is the largest private employer in a vast area with a historically high unemployment rate. Power for the mine, which operates continuously, is provided by the mine's six diesel-driven electric generators. To increase production, in 1998, Cominco proposed the addition of a new generator. This required a state permit.

The State of Alaska is an "attainment," or clean air area, for nitrogen oxide (NOx). That is, its air quality is cleaner than the national standards for this constituent. Because the new generator would increase NOx emissions, Cominco was required to obtain a Clean Air Act permit known as a PSD (Prevention of Significant Deterioration) permit. PSD permits are available from the Alaska Department of Environmental Conservation (ADEC) under the state's EPA-approved clean air

program. As a permit condition, new sources of NOx emissions must be equipped with BACT (best available control technology) to minimize pollutants. BACT is defined as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 U.S.C. § 7479(3).

One option for BACT involved the use of Selective Catalytic Reduction, or SCR, on the new generator. SCR is a process involving injection of ammonia, or urea, into the exhaust and combining it with a catalyst to ensure more complete combustion. However, ADEC concluded that the cost of SCR was excessive—$2.9 million in capital costs and nearly $635,000 in annual operating expenses. As an alternative, Cominco proposed installing "Low NOx" controls on *all* of its generators, not just the one subject to permitting. This method relies on high-combustion air temperatures to atomize toxic particles and reduce NOx emissions. ADEC determined that this technology was more cost effective than SCR and the use of "Low NOx" on *all* the generators would reduce overall emissions from the mine more than SCR on the new generator. In 1999, ADEC designated "Low NOx" controls as BACT and issued Cominco a PSD permit.

Only after the close of the comment period did EPA express its disagreement with ADEC's BACT determination.

EPA ordered ADEC to require the use of SCR on the new generator. Because SCR had never been required as BACT for this type of generator, was less cost effective than "Low NOx" controls, and could result in more overall emissions, ADEC refused to modify its permit. As a result, EPA ordered Cominco not to operate the new generator. Cominco and ADEC then filed suit in federal court for a determination of whether EPA has unilateral authority to override the State's discretionary BACT determination. In July, 2002, the Ninth Circuit held that EPA *can* override a state's BACT determination. The State of Alaska then petitioned the case to this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under the Clean Air Act, the State receives federal authorization to implement its own air pollution program only after satisfying EPA that the state program meets all federal standards for implementation, maintenance, and enforcement. *See* 42 U.S.C. § 7410(a)(1). Alaska met these exacting standards and received EPA authorization for its state air pollution program. At no time in this case has EPA questioned Alaska's fitness to keep its federal authorization or threatened sanctions against the State for failure to meet federal air pollution standards, although the EPA has the power to impose sanctions, including the suspension of federal highway moneys. *See* 42 U.S.C. § 7509. At root, EPA's objection in this case stems from its preference for a more costly, but less effective, emission control technology than the State of Alaska selected for the Red Dog Mine. Because the State's selection of "Low NOx" controls would have minimized overall emissions at the mine, it defies common sense and the clear purpose of the Act to allow EPA to interfere with the State's implementation strategy. Moreover, federal deference to discretionary state permitting decisions ensures finality and fairness in the administrative process, improves regulatory efficiency,

empowers local enforcement officials, and allows for an appropriate accommodation of local interests and needs. Congress could not have intended that the statutory scheme of relying on state implementation would be undermined by EPA overriding individual state permit decisions.

ARGUMENT

I

CONGRESS INTENDED THE STATES—NOT EPA—TO ASSUME RESPONSIBILITY FOR IMPLEMENTATION OF THE NATIONAL AIR QUALITY STANDARDS

Under the Clean Air Act, EPA is authorized to set general goals for air quality. But the means of achieving those goals was left to the states: "Increasingly, the primary role of implementing these goals falls to the states." *See* E. Donald Elliott, *Federal Versus State Environmental Protection Standards: Can a National Policy Be Implemented Locally?*, 22 Envtl. L. Rep. 10010 (1992). Indeed, in the CAA, Congress expressly recognized the preeminent role of the states in addressing air pollution:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 7407(a).

The effect of this provision was set out by this Court in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). In that case, this Court acknowledged that Congress plainly charged EPA with the responsibility to set national

ambient air quality standards. *Id.* at 79. But, this Court observed that EPA is just as plainly "relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id.* According to this Court:

> Under §110(a)(2), the Agency is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

Id.

No doubt the willingness of a state to adopt a State Implementation Plan under the CAA, like Alaska did in this case, rests in part on the recognition that the state will have wide discretion in how it achieves the national ambient air quality standards without ad hoc interference by EPA. Although the states were generally considered recalcitrant in assuming this responsibility in the 1970's, hard evidence of a change toward strong state implementation of environmental laws was apparent by the mid 1980's. *See* Elliott, *supra*, at 10010. Congressional Budget Office calculations for 1987

indicated, for example, that well over 80% of total government expenditures on the environment occurred at state and local levels. *Id.* This same pattern was reflected in clean air expenditures. *Id.* In enforcement, the change was even more striking. *Id.* Approximately 70% of all environmental enforcement cases was initiated by the states. *Id.* This shift toward increased state responsibility formed the basis for Elliott's conclusion: "In many areas today, particular state agencies are as sophisticated, if not more so, than EPA in their approaches to environmental problems."

As other authors have noted:

> Twenty years ago, one of the main reasons for an increased federal role in environmental protection was the inadequacy of state programs, including state enforcement. Today, allowing states and, in some cases, local governments, to reassume a greater enforcement role may be the only way to ensure an effective enforcement presence among the tens of thousands of regulated entities that now exist in each state. Strong, well-focused enforcement efforts designed to address the varying types of regulated entities in each state are necessary to obtain the high levels of voluntary compliance without which the vast regulatory programs will not succeed.

Hubert H. Humphrey & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for More Effective and More Efficient Relationship*, 14 Harv. Envtl. L. Rev. 7, 36-37 (1990).

The effectiveness of the State of Alaska to enforce its air pollution program and advance the purposes of the CAA was certainly demonstrated in this case.

The CAA requires BACT to be determined "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). It would be hard to find a statutory provision calling for greater discretion. In accordance with this provision, ADEC considered a number of pollution control devices, including SCR, and concluded that "Low NOx" controls was BACT for the Red Dog Mine because it minimized emissions and was substantially more cost effective than other alternatives. The Ninth Circuit acknowledged this fact and the EPA has not shown otherwise. *See Alaska Dept. of Environmental Conservation v. United States EPA*, 298 F.3d 814, 817 (9th Cir. 2002). ADEC also took into account the potential loss of jobs and decline in world competitiveness at the mine if SCR was required. But EPA ignored all of these factors and ordered ADEC and the mine to utilize the more expensive, perhaps even economically infeasible, but less effective overall emission control technology.

Showing greater sophistication than EPA demonstrated in addressing this permit issue, ADEC went beyond the economic considerations and took into account the overall goal of the CAA and the purpose of BACT, to minimize emissions, and authorized the use of "Low NOx" controls. Instead of the more costly and less effective SCR, Cominco was willing to install "Low NOx" technology on all of the mine's generators, even those not subject to BACT requirements. Thus, the State was able to gain concessions from the Red Dog Mine that it could not require by regulation and minimize emissions at the same time.

This Court encouraged this approach in an analogous situation in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). In *Gwaltney*, this Court considered whether the citizen suit provision in the Clean Water Act authorized citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction. To

the contrary, this Court concluded that the citizen suit provision of the Clean Water Act was intended to support the government's enforcement program and not displace it. To make its point, this Court suggested a hypothetical. "Suppose," this Court said, "the Administrator [of EPA] identified a violator and issued a compliance order." *Id.* at 60. "Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 60-61. "If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61.

But that is the case here. If EPA can displace a state's air pollution enforcement program by invalidating a discretionary state air permit decision, as the lower court held it could, at virtually any time, to pursue its own enforcement goals, then the state's discretion to enforce the CAA in the public interest would be curtailed considerably. EPA's overriding order to use less effective but more expensive SCR emission controls not only robbed the State of Alaska of its discretionary power to determine BACT, but the order would harm the local community and, ironically, the environment. This defies common sense and the clear purpose of the Act. It is no wonder that "[s]tates sometimes claim that the agency . . . pays more attention to details than to overall policy objectives." Elliott, *supra*, at 10010. Congress could not have intended to undermine the primary responsibility of the states, to enforce the CAA, by ad hoc federal invalidation of discretionary state permit decisions.

II

DEFERENCE TO STATE PERMIT DECISIONS UNDER A FEDERALLY APPROVED AIR POLLUTION PLAN FURTHERS THE GOALS OF FINALITY AND FAIRNESS, REGULATORY EFFICIENCY, LOCAL EMPOWERMENT, AND CONSIDERATION OF LOCAL INTERESTS AND NEEDS

In our brief in support of the Petition for Writ of Certiorari, we cited two articles demonstrating how EPA's nullification of state enforcement actions–and by analogy discretionary state permit decisions--undermines federal goals for environmental protection. In the first article, the author examined the EPA practice of "overfiling" under the CAA which, not unlike the order invalidating the air pollution permit in this case, involves an independent enforcement action when the state has already initiated an enforcement action against the same party. *See* Steven D. Cook, *State/Federal Enforcement of the Clean Air Act and Other Federal Pollution Laws: Federal Overfiling on State Enforcement Proceedings*, 1987 B.Y.U. L. Rev. 1085.

In sum, Cook identified three substantial problems with EPA's intrusion into state enforcement decisions. First, subsequent negotiations with EPA over conditions or penalties can delay resolution of environmental problems. *Id.* at 1095. Second, EPA interference discourages cooperation between the public and the states because of the knowledge that whatever the state decides the EPA may have to be satisfied later. *Id.* at 1096. And third, EPA interference undermines state credibility with the public because the regulated community cannot rely on state enforcement decisions. *Id.* Based on these observations, Cook concluded that EPA interference with state enforcement strategies actually undermines the federal goals of deterrence,

fair and equitable treatment of the regulated community, and rapid resolution of environmental problems. *Id.* at 1095-1101. The same can be said for EPA interference with state permit decisions.

In the second article, Humphrey and Paddock concluded, much like Cook, that when EPA overrides the states it results in redundant enforcement efforts, introduces uncertainty into the state enforcement program, saps the limited enforcement resources of state and federal agencies, undermines and disrupts the federal-state working relationships, and conflicts with the role of the states in addressing environmental problems. *See* Humphrey & Paddock, *supra*, at 39.

But Cook, Humphrey, and Paddock are not alone in this assessment. According to Wiens and Hefner, "The Environmental Protection Agency's . . . oversight role [under the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act] has been clashing recently with Congress' explicit intent to vest primary enforcement authority in the states." Susan K. Wiens & William P. Hefner, *Disharmony in EPA's Overfiling Policy*, 15 SUM Nat. Resources & Env't 3 (2000). The clash derives from ad hoc EPA interference with state enforcement decisions. *Id.* at 3.

Although Wiens and Hefner report that EPA intrusion into state programs is rare, involving only about 0.1% of state enforcement actions in fiscal years 1994 and 1995, they note that the numbers do not account for the disruption to state programs caused by the mere threat of EPA interference which "causes numerous problems." *Id.* at 6. One of the more serious problems is "uncertainty in the public mind." *Id.* After all, with whom should industry deal? "Must it negotiate with both state and federal authorities? Should it insist that the EPA sign off on all agreements with authorized state agencies?" *Id.*

Other problems include waste of federal and state resources. *Id.* at 7. In the present case, for example, both the

State of Alaska and the EPA are diverting limited resources to litigate the scope of EPA authority caused by EPA invalidation of the State's discretionary BACT determination—a use of resources that should be unnecessary. Beyond these problems, however, Wiens and Hefner conclude that EPA intrusion into state enforcement decisions causes "distrust among the agencies" although "each believes it is acting in the best interest of the environment." *Id.*

On the other side of the coin, Melnick and Willes point out the numerous benefits that accrue when EPA defers to state and local permit decisions. *See* Marc Melnick & Elizabeth Willes, *Watching the Candy Store: EPA Overfiling of Local Air pollution Variances*, 20 Ecology L.Q. 207 (1993). Although these authors do not favor absolute local autonomy, they have found compelling arguments for relying on state and local permit decisions, including "arguments for finality and fairness, efficiency, empowerment, and local interests." *Id* at 250.

A. Finality and Fairness

According to Melnick and Willes, federal reliance on state and local permit actionss would accomplish two purposes. "First, it would allow for finality in decisions." *Id.* at 251. Applicants who receive a permit would be assured that their actions are authorized and need not fear a federal challenge. *Id.* They would also have to contend with only one regulator which would allow businesses more definite planning. *Id.* Second, "[s]ole enforcement authority might also be more fair." *Id.*

> A source that fulfills the local requirements feels whiplashed when it suddenly finds itself subject to a federal enforcement action. While regulators may not be overly sensitive to this issue, the fairness argument has merit in the equitable realms of the courts . . . . Furthermore, fairness creates a better

> atmosphere for cooperation between the regulated and the regulators, which produces better compliance.

Id.

B. Efficiency

"Fragmented enforcement authority can lead to duplication of effort, to delay, and to underenforcement." *Id.* at 252. Cook made a similar observation:

> Federal efforts merely duplicate the state's actions by requiring [the regulated entity] to go through a second set of negotiations. This new round of negotiations usually produces no additional benefit to the environment.

Cook, *supra*, at 1095.

C. Empowerment

Giving greater autonomy to local officials "vests in them greater responsibility for the overall enforcement scheme of the CAA." Melnick & Willes, *supra*, at 252. Exclusive autonomy would eliminate speculation about EPA interference with local decisions. *Id.* This would increase the credibility of local officials that would result in greater cooperation from the regulated community. *Id.* "Such cooperation would further the goals of environmental protection." *Id.*

D. Local Interests

Local officials take into account local conditions, like ADEC did in this case. "The resulting decision making is more responsive to local needs than it would be under a strict interpretation of the CAA." *Id.* at 253. According to Melnick and Willes, "While EPA may look only at environmental effects, local agencies are more likely to consider the whole picture." *Id.*

In this case, EPA looked only at the environmental effects of BACT on the new generator without considering the emissions from the facility as a whole. As ADEC determined, the use of "Low NOx" technology on all the generators, including those not subject to BACT, would reduce overall emissions more than SCR on the new generator. Not only is this in keeping with a proper BACT determination, that requires a case-by-case consideration of "energy, environmental, and economic impacts and other costs," 42 U.S.C. § 7479(3), but it also makes good sense and furthers the purpose of BACT and the CAA to reduce air pollution. Congress could not have intended to disturb such state determinations by overzealous EPA oversight.

CONCLUSION

EPA interference with discretionary state decisions, under a federally-approved state air pollution program, including state BACT determinations, undermines the statutory role of the states as the primary enforcer of national air quality standards. The invalidation of Alaska's air permit in this case also defies common sense and the purpose of the Clean Air Act to minimize air pollution.

For these reasons, this Court should overturn the decision below.

DATED: April, 2003.

Respectfully submitted,

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(9)
Supreme Court, U.S.
FILED
APR 25 2003

No. 02-658

IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 25, 2002
CERTIORARI GRANTED FEBRUARY 24, 2003

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-70166

STATE OF ALASKA, Department of Environmental Conservation,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

DOCKET ENTRIES

DATE	PROCEEDINGS
2/8/00	FILED PETITION FOR REVIEW DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL, NOTIFIED RESPONDENTS OF FILING, SENT PETITIONER CIVIL APPEALS DOCKETING STATEMENT. setting schedule as follows: petitioners' opening brief is due 4/28/00; respondents' brief is due 5/30/00; petitioner's optional reply brief is due 6/12/00. [00-70166] (wp) [00-70166]
3/20/00	Filed joint mtn to consolidate (00-70166/70169/70175/70301) set coordinated briefing schedule, and extend deadline for filing of the certified index to record; served 3/17/00. (MOATT via PROMO) [00-70166, 00-70169, 00-70175, 00-

70301] [3873459] (rc) [00-70166 00-70169 00-70175 00-70301]

4/4/00 Received Respondent EPA's opposition to motion for stay and cross-motion to dismiss; served on 4/3/00. (opposition exceeds FRAP limits – motion pending – MoAtt) [00-70166, 00-70169, 00-70175, 00-70301] (dl) [00-70166 00-70169 00-70175 00-70301]

4/17/00 Received Cominco Alaska in 00-70169, 00-70175, 00-70301 reply in opposition to motion to dismiss. served on 4/14/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

4/19/00 Received State's opposition to EPA's motion to dismiss petitions. (served on 4/14/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

4/28/00 Received Respondents' reply in support of mtn to dismiss petitions for lack of subject matter jurisdiction; unopposed mtn of respondents for leave to file an oversized reply in support of mtn to dismiss petition for lack of subject matter jurisdiction; respondents' ntc of suppl administrative action; served on 4/27/00. (MOATT) [00-70166, 00-70169, 00-70175, 00-70301] (rc) [00-70166 00-70169 00-70175 00-70301]

5/9/00 Received Cominco Alaska opposition to motion to dismiss. (served on 5/8/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

5/11/00 Filed Petitioner State of Alaska surreply in opposition to motion to dismiss along with a motion to allow filing of surreply; served on 5/9/00 (MOATT) [00-70166] (wp) [00-70166]

6/1/00 Filed order (Harry PREGERSON, Ferdinand F. FERNANDEZ, Kim M. WARDLAW): Petitioner the State of Alaska Department of Environmental Conservation ("ADEC"), petitioner Cominco Alaska Incorporated ("Cominco") and respondents the U.S. Environmental Protection Agency, Carol M. Browner and Chuck Clarke's (EPA) 3/20/00 joint motion to consolidate petition 00-70166, 00-70169, 00-70175 and 00-70301 is granted. Petition nos. 00-70166, 00-70169, 00-70175 and 00-70301 are consolidated. Petitioner Cominco's unopposed motion for leave to file an oversized motion for stay is granted. The Clerk shall file Cominco's 3/20/00 motion for stay. Petitioner ADEC's March 31, 2000 motion for joinder in Cominco's motion for stay of the EPA's 12/10/99, 2/8/00 and 3/7/00 orders pending appeal is granted. Respondents' March 28, 2000 motion for extension of time to file the response to petitioners' motion for stay is granted. Respondents' unopposed 4/4/00 motion for leave to file an oversized opposition to petitioners' motion for stay is granted. The Clerk shall file respondents' 4/4/00 opposition to petitioners' motion for stay, and respondents cross-motion to dismiss. The Clerk shall also file respondents' 4/6/00 addendum to its opposition to the motion for stay, and respondents' motion to dismiss. Petitioner Cominco's unopposed motion to file an oversized reply in support of its motion to dismiss is granted. The Clerk shall file the reply received 4/28/00. Petitioner Cominco's motion to file a surreply in opposition to respondents' motion to dismiss is granted. The Clerk shall file the surreply rec'd 5/9/00. The Clerk shall file petitioner ADEC's 4/19/00 opposition to respondents' motion to dismiss. Petitioner ADEC's motion to file a surreply in opposition to respondents' motion to dismiss is granted. The surreply was filed 5/11/00. Petitioner

ADEC's motion for oral argument is denied. Petitioner Cominco's March 20, 2000 motion to stay respondent EPA's 12/10/99, 2/8/00 and 3/7/00 orders pending appeal is denied. Respondents' 4/4/00 cross-motion to dismiss is denied. The 3/20/00 joint motion of Petitioners ADEC, Cominco and respondent EPA to extend the time to file the certified index to the admin record is granted. The certified index to the admin record is due 6/26/00. Respondents' 4/3/00 motion to stay filing of the certified index to the admin record is denied as moot. The following briefing schedule shall govern these consolidated petitions for review: the opening briefs are due 6/26/00; the answering brief is due 7/26/00. Requests for extension of time will be looked upon with disfavor. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. All briefs shall comply with the page and type-volume limitations set forth in FRAP 32(a)(7). If all parties on a side file a joint brief, these parties may, in accordance with Ninth Circuit Rule 28-4, timely move for enlargement of size of 5 monotype pages or 1,400 words. Requests for enlargement of size greater than 5 pages or 1,400 words will be looked upon with extreme disfavor. MOTION FOR STAY DENIED; MOTION TO DISMISS DENIED. [00-70166, 00-70169, 00-70175, 00-70301] (ft) [00-70166 00-70169 00-70175 00-70301]

6/23/00 Received Respondent EPA in 00-70166's Notice of filing certified index to the Admin. Record, served on 6/22/00 (Casefile) [00-70166] (kc) [00-70166]

6/29/00 Filed original and 15 copies Petitioner State of Alaska in 00-70166, Petitioner Cominco Alaska in 00-70169, Petitioner Cominco Alaska Inc. in

00-70175, Petitioner Cominco Alaska in 00-70301 opening brief (Informal: n) 57 pages and five excerpts of record in 2 volumes; served on 6/26/00 [00-70166, 00-70169, 00-70175, 00-70301] (je) [00-70166 00-70169 00-70175 00-70301]

8/17/00 Filed original and 15 copies respondent EPA in 00-70166, 00-70169, 00-70175, 00-70301 in 66 pages brief, 5 Exc. in 1 vol; served on 8/16/00. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

9/7/00 Filed original and 15 copies State of Alaska, Cominco Alaska, Cominco Alaska Inc., Cominco Alaska's reply brief, (Informal: no) 46 pages; with 5 Sup. Exc of Record in 1 volume; served on 9/5/00. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

1/10/01 Filed Order (Deputy Clerk: gb) Petitioner's motion to expedite and decision on appeal is DENIED. Petitioner's motion to allow longer oral argument is also DENIED. NANA Regional Corporation, Inc.'s motion for leave to file an amicus letter brief is GRANTED. This letter brief is hereby submitted. NANA Regional Corporation, Inc. shall be notified by mail through its general counsel, Jacquelyn R. Luke, at 1001 E. Benson Blvd., Anchorage, AK 99508 (907)265-4148. The Native Village of Kivalina's motion for leave to file an amicus letter brief is GRANTED. This letter brief is hereby submitted. The Native Village of Kivalina shall be notified by mail through its atty and trustee, Michael J. Frank, at 1026 West 4th Ave., Ste 201, Anchorage, AK 99501 (907)276-4244x116) (faxed to PANEL and phoned counsels at 3:00p.m.) [00-

70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

1/11/01 FILED CERTIFIED COPY OF ADMINISTRATIVE RECORD ON APPEAL: 1 CARTON CONTAINING 87 DOCUMENTS.(ORIGINAL) [00-70166] [00-70166] (sd) [00-70166]

2/9/01 Received Andrew J. Doyle for Respondent EPA letter dated 2/8/01 re: current event relating to the Dec 10, 99 prevention of significant deterioration construction permit (No.9932-AC005) that Petitioner State of Alaska, Dept of Environmental Conservation issued to Petitioner Cominco Alaska, Inc. (with attachment) (faxed to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

2/13/01 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD [00-70166, 00-70169, 00-70175, 00-70301] (ss) [00-70166 00-70169 00-70175 00-70301]

3/27/01 Filed Order (FOR PUBLICATION) (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) Within 60 days of this order, the EPA may either (1) submit a complete administrative record which will allow this Court to review the justification for the EPA's decision to issue the Orders before us; (2) withdraw the Orders that are the subjects of these petitions or (3) file an enforcement action, (cite), in the appropriate U.S. District Court....(Please see casefile for complete text) Should the EPA opt to submit the administrative record rather than to pursue an enforcement action or to withdraw its Orders, petitioners and respondents are ordered to file, within 21 days of such submission, supplemental briefs, not to exceed 15 pgs, assessing the im-

pact, if any, (cite), on the question whether it is the EPA or ADEC which has the ultimate authority to make BACT determinations. The parties shall provide notice of the status of these proceedings to this Court within 60 days hereof. Submission of this matter is hereby vacated until further notice by this Court. IT IS SO ORDERED. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

6/19/01 Filed original and 15 copies Respondent EPA's supplemental brief of 11 pages, served on 6/18/01. (per 3/27/01 ct's order) (PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

6/19/01 Filed original and 15 copies Petitioner State of Alaska, Petitioner Cominco Alaska Incorporated's supplemental brief of 13 pages, served on 6/18/01. (per 3/27/01 ct's order) (PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

8/3/01 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) The Alaska Dept of Environment Conservation's ("ADEC") motion for leave to file a response to the EPA's Hardesty Declaration is DENIED. We further order, however, ADEC and Cominco Alaska, Inc. ("Cominco") to file a response to the Hardesty Declaration that states whether they agree that the material provided by the EPA and described in the Hardesty Declaration constitutes the complete administrative record in this proceedings as both a factual and legal matter. If ADEC and Cominco contend that the materials described in the Hardesty Declaration do not constitute a complete administrative record, they are further ordered to provide legal authority for

this proposition and evidence that additional material exists. In addition, they are ordered to provide legal authority for any proposed form of relief, such as discovery, they may seek to remedy any asserted failure by the EPA to provide the complete administrative record. ADEC and Cominco are further ordered to file their responses or a combined response within 14 days of the date hereof. The EPA may file a response within 10 days thereafter. IT IS SO ORDERED. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

2/28/02 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) Having considered the recent submissions of the parties agreeing to the factual record on appeal and the brfs filed beginning in 6/2000 (almost two yrs ago), we have determined that supp briefing would be of assistance in the determination of the cause. Therefore, it is ORDERED that each side file a supp brf not to exceed 25 pgs within 28 days of the date hereof on the following question: whether it is the state of Alaska (through ADEC) or the EPA that bears the ultimate legal authority and responsibility under the Clean Air Act to determine whether an individual Prevention of Significant Deterioration permit issued by Alaska pursuant to its State Implementation Plan (SIP) meets the requirements of the Clean Air Act or the SIP. If any party desires additional oral argument in this matter, it should file a request, along with a brf statement of the reasons it believes additional argument is necessary. It is so ORDERED. (served PANEL; phoned and faxed to csls at 3:00p.m.; c.c. Front Counter) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

3/28/02 Filed Original and 15 copies of Respondent EPA's Supplemental brief of 25 pages pursuant to ct's order of 2/28/02; served on 3/27/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

3/29/02 Filed Original and 15 copies Petitioner Cominco Alaska Incorporated's supplemental brief of 25 pages, served on 3/28/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

4/1/02 Filed original and 15 copies Petitioner State of Alaska in 00-70166 supplemental brief of 10 pages, served on 3/28/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) This cs is hereby resubmitted as of the date of this order. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 Case resubmitted on this date to Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD. (See previous deferral of submission.) Order filed: 7/30/02. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 FILED OPINION: DENIED. (Terminated on the Merits after Oral Hearing; Enforced; Written, Signed, Published. Stephen R. REINHARDT; Kim M. WARDLAW, author; Ronald M. GOULD.) FILED AND ENTERED JUDGMENT. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

9/23/02	MANDATE ISSUED [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]
11/4/02	Received notice from Supreme Court: petition for certiorari filed on 10/25/02 and placed on the docket 10/31/02; Supreme Court No. 02-658. (CASEFILES) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]
2/28/03	Received notice from Supreme Court, petition for certiorari GRANTED on 2/24/03. Supreme Court No. 02-658. (faxed to PANEL) (re-entered) (af) [00-70166 00-70169 00-70175 00-70301]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-70169

TECK COMINCO ALASKA INCORPORATED,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

DOCKET ENTRIES

DATE	PROCEEDINGS
2/8/00	FILED PETITION FOR REVIEW; DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. NOTIFIED RESPONDENTS OF FILING. Setting schedule as follows: petitioners' opening brief is due 5/1/00; respondents' brief is due 5/31/00; petitioner's optional reply brief is due within fourteen days from service of the answering brief. [00-70169] (dl) [00-70169]
3/20/00	Filed joint mtn to consolidate (00-70166/70169/70175/70301) set coordinated briefing schedule, and extend deadline for filing of the certified index to record; served 3/17/00. (MOATT via PROMO) [00-70166, 00-70169, 00-70175, 00-70301] [3873459] (rc) [00-70166 00-70169 00-70175 00-70301]
4/4/00	Received Respondent EPA's opposition to motion for stay and cross-motion to dismiss;

served on 4/3/00. (opposition exceeds FRAP limits - motion pending - MoAtt) [00-70166, 00-70169, 00-70175, 00-70301] (dl) [00-70166 00-70169 00-70175 00-70301]

4/6/00 Received Respondent EPA's addendum to opposition to petitioner's motion for stay and cross-motion to dismiss; served on 4/5/00. (MoAtt) [00-70166, 00-70169, 00-70175, 00-70301] (dl) [00-70166 00-70169 00-70175 00-70301]

4/17/00 Received Cominco Alaska in 00-70169, 00-70175, 00-70301 reply in opposition to motion to dismiss. served on 4/14/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

4/19/00 Received State's opposition to EPA'S motion to dismiss petitions. (served on 4/14/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

4/28/00 Received Respondents' reply in support of mtn to dismiss petitions for lack of subject matter jurisdiction; unopposed mtn of respondents for leave to file an oversized reply in support of mtn to dismiss petition for lack of subject matter jurisdiction; respondents' ntc of suppl administrative action; served on 4/27/00. (MOATT) [00-70166, 00-70169, 00-70175, 00-70301] (rc) [00-70166 00-70169 00-70175 00-70301]

5/9/00 Received Cominco Alaska opposition to motion to dismiss. (served on 5/8/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

6/1/00 Filed order (Harry PREGERSON, Ferdinand F. FERNANDEZ, Kim M. WARDLAW): Petitioner the State of Alaska Department of Environmental Conservation ("ADEC"), petitioner

Cominco Alaska Incorporated ("Cominco") and respondents the U.S. Environmental Protection Agency, Carol M. Browner and Chuck Clarke's (EPA) 3/20/00 joint motion to consolidate petition 00-70166, 00-70169, 00-70175 and 00-70301 is granted. Petition nos. 00-70166, 00-70169, 00-70175 and 00-70301 are consolidated. Petitioner Cominco's unopposed motion for leave to file an oversized motion for stay is granted. The Clerk shall file Cominco's 3/20/00 motion for stay. Petitioner ADEC's March 31, 2000 motion for joinder in Cominco's motion for stay of the EPA's 12/10/99, 2/8/00 and 3/7/00 orders pending appeal is granted. Respondents' March 28, 2000 motion for extension of time to file the response to petitioners' motion for stay is granted. Respondents' unopposed 4/4/00 motion for leave to file an oversized opposition to petitioners' motion for stay is granted. The Clerk shall file respondents' 4/4/00 opposition to petitioners' motion for stay, and respondents cross-motion to dismiss. The Clerk shall also file respondents' 4/6/00 addendum to its opposition to the motion for stay, and respondents' motion to dismiss. Petitioner Cominco's unopposed motion to file an oversized reply in support of its motion to dismiss is granted. The Clerk shall file the reply received 4/28/00. Petitioner Cominco's motion to file a surreply in opposition to respondents' motion to dismiss is granted. The Clerk shall file the surreply rec'd 5/9/00. The Clerk shall file petitioner ADEC's 4/19/00 opposition to respondents' motion to dismiss. Petitioner ADEC's motion to file a surreply in opposition to respondents' motion to dismiss is granted. The surreply was filed 5/11/00. Petitioner ADEC's motion for oral argument is denied. Petitioner Cominco's March 20, 2000 motion to stay re-

spondent EPA's 12/10/99, 2/8/00 and 3/7/00 orders pending appeal is denied. Respondents' 4/4/00 cross-motion to dismiss is denied. The 3/20/00 joint motion of Petitioners ADEC, Cominco and respondent EPA to extend the time to file the certified index to the admin record is granted. The certified index to the admin record is due 6/26/00. Respondents' 4/3/00 motion to stay filing of the certified index to the admin record is denied as moot. The following briefing schedule shall govern these consolidated petitions for review: the opening briefs are due 6/26/00; the answering brief is due 7/26/00. Requests for extension of time will be looked upon with disfavor. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. All briefs shall comply with the page and type-volume limitations set forth in FRAP 32(a)(7). If all parties on a side file a joint brief, these parties may, in accordance with Ninth Circuit Rule 28-4, timely move for enlargement of size of 5 monotype pages or 1,400 words. Requests for enlargement of size greater than 5 pages or 1,400 words will be looked upon with extreme disfavor. MOTION FOR STAY DENIED; MOTION TO DISMISS DENIED. [00-70166, 00-70169, 00-70175, 00-70301] (ft) [00-70166 00-70169 00-70175 00-70301]

6/29/00 Filed original and 15 copies Petitioner State of Alaska in 00-70166, Petitioner Cominco Alaska in 00-70169, Petitioner Cominco Alaska Inc. in 00-70175, Petitioner Cominco Alaska in 00-70301 opening brief (Informal: n) 57 pages and five excerpts of record in 2 volumes; served on 6/26/00 [00-70166, 00-70169, 00-70175, 00-70301] (je) [00-70166 00-70169 00-70175 00-70301]

8/17/00 Filed original and 15 copies respondent EPA in 00-70166, 00-70169, 00-70175, 00-70301 in 66 pages brief, 5 Exc. in 1 vol; served on 8/16/00. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

9/7/00 Filed original and 15 copies State of Alaska, Cominco Alaska, Cominco Alaska Inc., Cominco Alaska's reply brief, (Informal: no) 46 pages; with 5 Sup. Exc of Record in 1 volume; served on 9/5/00. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

1/10/01 Filed Order (Deputy Clerk: gb) Petitioner's motion to expedite and decision on appeal is DENIED. Petitioner's motion to allow longer oral argument is also DENIED. NANA Regional Corporation, Inc.'s motion for leave to file an amicus letter brief is GRANTED. This letter brief is hereby submitted. NANA Regional Corporation, Inc. shall be notified by mail through its general counsel, Jacquelyn R. Luke, at 1001 E. Benson Blvd., Anchorage, AK 99508 (907)265-4148. The Native Village of Kivalina's motion for leave to file an amicus letter brief is GRANTED. This letter brief is hereby submitted. The Native Village of Kivalina shall be notified by mail through its atty and trustee, Michael J. Frank, at 1026 West 4th Ave., Ste 201, Anchorage, AK 99501 (907)276-4244x116) (faxed to PANEL and phoned counsels at 3:00p.m.) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

1/11/01 FILED CERTIFIED COPY OF ADMINISTRATIVE RECORD ON APPEAL: 1 CARTON CONTAINING 87 DOCUMENTS.(ORIGINAL) [00-70166] [00-70166] (sd) [00-70166]

2/9/01 Received Andrew J. Doyle for Respondent EPA letter dated 2/8/01 re: current event relating to the Dec 10, 99 prevention of significant deterioration construction permit (No.9932-AC005) that Petitioner State of Alaska, Dept of Environmental Conservation issued to Petitioner Cominco Alaska, Inc. (with attachment) (faxed to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

2/13/01 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD [00-70166, 00-70169, 00-70175, 00-70301] (ss) [00-70166 00-70169 00-70175 00-70301]

3/27/01 Filed Order (FOR PUBLICATION) (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) Within 60 days of this order, the EPA may either (1) submit a complete administrative record which will allow this Court to review the justification for the EPA's decision to issue the Orders before us; (2) withdraw the Orders that are the subjects of these petitions or (3) file an enforcement action, (cite), in the appropriate U.S. District Court....(Please see casefile for complete text) Should the EPA opt to submit the administrative record rather than to pursue an enforcement action or to withdraw its Orders, petitioners and respondents are ordered to file, within 21 days of such submission, supplemental briefs, not to exceed 15 pgs, assessing the impact, if any, (cite), on the question whether it is the EPA or ADEC which has the ultimate authority to make BACT determinations. The parties shall provide notice of the status of these proceedings to this Court within 60 days hereof. Submission of this matter is hereby vacated until

further notice by this Court. IT IS SO ORDERED. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

6/19/01 Filed original and 15 copies Respondent EPA's supplemental brief of 11 pages, served on 6/18/01. (per 3/27/01 ct's order) (PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

6/19/01 Filed original and 15 copies Petitioner State of Alaska, Petitioner Cominco Alaska Incorporated's supplemental brief of 13 pages, served on 6/18/01. (per 3/27/01 ct's order) (PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

8/3/01 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) The Alaska Dept of Environment Conservation's ("ADEC") motion for leave to file a response to the EPA's Hardesty Declaration is DENIED. We further order, however, ADEC and Cominco Alaska, Inc. ("Cominco") to file a response to the Hardesty Declaration that states whether they agree that the material provided by the EPA and described in the Hardesty Declaration constitutes the complete administrative record in this proceedings as both a factual and legal matter. If ADEC and Cominco contend that the materials described in the Hardesty Declaration do not constitute a complete administrative record, they are further ordered to provide legal authority for this proposition and evidence that additional material exists. In addition, they are ordered to provide legal authority for any proposed form of relief, such as discovery, they may seek to remedy any asserted failure by the EPA to provide the complete administrative record. ADEC and

Cominco are further ordered to file their responses or a combined response within 14 days of the date hereof. The EPA may file a response within 10 days thereafter. IT IS SO ORDERED. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

2/28/02 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD,) Having considered the recent submissions of the parties agreeing to the factual record on appeal and the brfs filed beginning in 6/2000 (almost two yrs ago), we have determined that supp briefing would be of assistance in the determination of the cause. Therefore, it is ORDERED that each side file a supp brf not to exceed 25 pgs within 28 days of the date hereof on the following question: whether it is the state of Alaska (through ADEC) or the EPA that bears the ultimate legal authority and responsibility under the Clean Air Act to determine whether an individual Prevention of Significant Deterioration permit issued by Alaska pursuant to its State Implementation Plan (SIP) meets the requirements of the Clean Air Act or the SIP. If any party desires additional oral argument in this matter, it should file a request, along with a brf statement of the reasons it believes additional argument is necessary. It is so ORDERED. (served PANEL; phoned and faxed to csls at 3:00p.m.; c.c. Front Counter) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

3/28/02 Filed original and 15 copies of Respondent EPA's Supplemental brief of 25 pages pursuant to ct's order of 2/28/02; served on 3/27/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

3/29/02 Filed Original and 15 copies Petitioner Cominco Alaska Incorporated's supplemental brief of 25 pages, served on 3/28/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

4/1/02 Filed Original and 15 copies Petitioner State of Alaska in 00-70166 supplemental brief of 10 pages, served on 3/28/02. (per 2/28/02 order of the ct) (PANEL) [00-70166, 00-70169, (af) [00-70169 00-70175 00-70301]

4/1/02 Filed original and 15 copies Petitioner State of Alaska in 00-70166 supplemental brief of 10 pages, served on 3/28/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) This cs is hereby resubmitted as of the date of this order. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 Case resubmitted on this date to Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD. (See previous deferral of submission.) Order filed: 7/30/02. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 FILED OPINION: DENIED. (Terminated on the Merits after Oral Hearing; Enforced; Written, Signed, Published. Stephen R. REINHARDT; Kim M. WARDLAW, author; Ronald M. GOULD.) FILED AND ENTERED JUDGMENT. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

9/23/02	MANDATE ISSUED [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]
11/4/02	Received notice from Supreme Court: petition for certiorari filed on 10/25/02 and placed on the docket 10/31/02; Supreme Court No. 02-658. (CASEFILES) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]
2/28/03	Received notice from Supreme Court, petition for certiorari GRANTED on 2/24/03. Supreme Court No. 02-658. (faxed to PANEL) (re-entered) (af) [00-70166 00-70169 00-70175 00-70301]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-70175

TECK COMINCO ALASKA INCORPORATED,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

DOCKET ENTRIES

DATE	PROCEEDINGS
2/15/00	FILED PETITION FOR REVIEW DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL, NOTIFIED RESPONDENTS OF FILING, SENT PETITIONER CIVIL APPEALS DOCKETING STATEMENT. setting schedule as follows: petitioners' opening brief is due 5/5/00; respondents' brief is due 6/5/00; petitioner's optional reply brief is due 6/19/00. [00-70175] (vt) [00-70175]
3/20/00	Filed joint mtn to consolidate (00-70166/70169/70175/70301) set coordinated briefing schedule, and extend deadline for filing of the certified index to record; served 3/17/00. (MOATT via PROMO) [00-70166, 00-70169, 00-70175, 00-70301] [3873459] (rc) [00-70166 00-70169 00-70175 00-70301]

4/4/00 Received Respondent EPA's opposition to motion for stay and cross-motion to dismiss; served on 4/3/00. (opposition exceeds FRAP limits - motion pending - MoAtt) [00-70166, 00-70169, 00-70175, 00-70301] (dl) [00-70166 00-70169 00-70175 00-70301]

4/6/00 Received Respondent EPA's addendum to opposition to petitioner's motion for stay and cross-motion to dismiss; served on 4/5/00. (MoAtt) [00-70166, 00-70169, 00-70175, 00-70301] (dl) [00-70166 00-70169 00-70175 00-70301]

4/17/00 Received Cominco Alaska in 00-70169, 00-70175, 00-70301 reply in opposition to motion to dismiss. served on 4/14/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

4/19/00 Received State's opposition to EPA's motion to dismiss petitions. (served on 4/14/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

4/28/00 Received Respondents' reply in support of mtn to dismiss petitions for lack of subject matter jurisdiction; unopposed mtn of respondents for leave to file an oversized reply in support of mtn to dismiss petition for lack of subject matter jurisdiction; respondents' ntc of suppl administrative action; served on 4/27/00. (MOATT) [00-70166, 00-70169, 00-70175, 00-70301] (rc) [00-70166 00-70169 00-70175 00-70301]

5/9/00 Received Cominco Alaska opposition to motion to dismiss. (served on 5/8/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

6/1/00 Filed order (Harry PREGERSON, Ferdinand F. FERNANDEZ, Kim M. WARDLAW): Petitioner the State of Alaska Department of Environmental Conservation ("ADEC"), petitioner Cominco Alaska Incorporated ("Cominco") and respondents the U.S. Environmental Protection Agency, Carol M. Browner and Chuck Clarke's (EPA) 3/20/00 joint motion to consolidate petition 00-70166, 00-70169, 00-70175 and 00-70301 is granted. Petition nos. 00-70166, 00-70169, 00-70175 and 00-70301 are consolidated. Petitioner Cominco's unopposed motion for leave to file an oversized motion for stay is granted. The Clerk shall file Cominco's 3/20/00 motion for stay. Petitioner ADEC's March 31, 2000 motion for joinder in Cominco's motion for stay of the EPA's 12/10/99, 2/8/00 and 3/7/00 orders pending appeal is granted. Respondents' March 28, 2000 motion for extension of time to file the response to petitioners' motion for stay is granted. Respondents' unopposed 4/4/00 motion for leave to file an oversized opposition to petitioners' motion for stay is granted. The Clerk shall file respondents' 4/4/00 opposition to petitioners' motion for stay, and respondents cross-motion to dismiss. The Clerk shall also file respondents' 4/6/00 addendum to its opposition to the motion for stay, and respondents' motion to dismiss. Petitioner Cominco's unopposed motion to file an oversized reply in support of its motion to dismiss is granted. The Clerk shall file the reply received 4/28/00. Petitioner Cominco's motion to file a surreply in opposition to respondents' motion to dismiss is granted. The Clerk shall file the surreply rec'd 5/9/00. The Clerk shall file petitioner ADEC's 4/19/00 opposition to respondents' motion to dismiss. Petitioner ADEC's motion to file a surreply in opposition to respondents' motion to dismiss is granted. The surreply was filed 5/11/00. Petitioner ADEC's

motion for oral argument is denied. Petitioner Cominco's March 20, 2000 motion to stay respondent EPA's 12/10/99, 2/8/00 and 3/7/00 orders pending appeal is denied. Respondents' 4/4/00 cross-motion to dismiss is denied. The 3/20/00 joint motion of Petitioners ADEC, Cominco and respondent EPA to extend the time to file the certified index to the admin record is granted. The certified index to the admin record is due 6/26/00. Respondents' 4/3/00 motion to stay filing of the certified index to the admin record is denied as moot. The following briefing schedule shall govern these consolidated petitions for review: the opening briefs are due 6/26/00; the answering brief is due 7/26/00. Requests for extension of time will be looked upon with disfavor. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. All briefs shall comply with the page and type-volume limitations set forth in FRAP 32(a)(7). If all parties on a side file a joint brief, these parties may, in accordance with Ninth Circuit Rule 28-4, timely move for enlargement of size of 5 monotype pages or 1,400 words. Requests for enlargement of size greater than 5 pages or 1,400 words will be looked upon with extreme disfavor. MOTION FOR STAY DENIED; MOTION TO DISMISS DENIED. [00-70166, 00-70169, 00-70175, 00-70301] (ft) [00-70166 00-70169 00-70175 00-70301]

6/29/00 Filed original and 15 copies Petitioner State of Alaska in 00-70166, Petitioner Cominco Alaska in 00-70169, Petitioner Cominco Alaska Inc. in 00-70175, Petitioner Cominco Alaska in 00-70301 opening brief (Informal: n) 57 pages and five excerpts of record in 2 volumes; served on 6/26/00 [00-70166, 00-70169, 00-70175, 00-70301] (je) [00-70166 00-70169 00-70175 00-70301]

8/17/00 Filed original and 15 copies respondent EPA in 00-70166, 00-70169, 00-70175, 00-70301 in 66 pages brief, 5 Exc. in 1 vol; served on 8/16/00. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

9/7/00 Filed original and 15 copies State of Alaska, Cominco Alaska, Cominco Alaska Inc., Cominco Alaska's reply brief, (Informal: no) 46 pages; with 5 Sup. Exc of Record in 1 volume; served on 9/5/00. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

12/13/00 Received Cominco Alaska's additional citations; served on 12/12/00. (RECORDS FOR MERIT PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

1/10/01 Filed Order (Deputy Clerk: gb) Petitioner's motion to expedite and decision on appeal is DENIED. Petitioner's motion to allow longer oral argument is also DENIED. NANA Regional Corporation, Inc.'s motion for leave to file an amicus letter brief is GRANTED. This letter brief is hereby submitted. NANA Regional Corporation, Inc. shall be notified by mail through its general counsel, Jacquelyn R. Luke, at 1001 E. Benson Blvd., Anchorage, AK 99508 (907)265-4148. The Native Village of Kivalina's motion for leave to file an amicus letter brief is GRANTED. This letter brief is hereby submitted. The Native Village of Kivalina shall be notified by mail through its atty and trustee, Michael J. Frank, at 1026 West 4th Ave., Ste 201, Anchorage, AK 99501 (907)276-4244x116) (faxed to PANEL and phoned counsels at 3:00p.m.) [00-

70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

1/11/01 FILED CERTIFIED COPY OF ADMINISTRATIVE RECORD ON APPEAL: 1 CARTON CONTAINING 87 DOCUMENTS.(ORIGINAL) [00-70166] [00-70166] (sd) [00-70166]

2/9/01 Received Andrew J. Doyle for Respondent EPA letter dated 2/8/01 re: current event relating to the Dec 10, 99 prevention of significant deterioration construction permit (No.9932-AC005) that Petitioner State of Alaska, Dept of Environmental Conservation issued to Petitioner Cominco Alaska, Inc. (with attachment) (faxed to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

2/13/01 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD [00-70166, 00-70169, 00-70175, 00-70301] (ss) [00-70166 00-70169 00-70175 00-70301]

3/27/01 Filed Order (FOR PUBLICATION) (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) Within 60 days of this order, the EPA may either (1) submit a complete administrative record which will allow this Court to review the justification for the EPA's decision to issue the Orders before us; (2) withdraw the Orders that are the subjects of these petitions or (3) file an enforcement action, (cite), in the appropriate U.S. District Court....(Please see casefile for complete text) Should the EPA opt to submit the administrative record rather than to pursue an enforcement action or to withdraw its Orders, petitioners and respondents are ordered to file, within 21 days of such submission, supplemental briefs, not to exceed 15 pgs, assessing the im-

pact, if any, (cite), on the question whether it is the EPA or ADEC which has the ultimate authority to make BACT determinations. The parties shall provide notice of the status of these proceedings to this Court within 60 days hereof. Submission of this matter is hereby vacated until further notice by this Court. IT IS SO ORDERED. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

6/19/01 Filed original and 15 copies Respondent EPA's supplemental brief of 11 pages, served on 6/18/01. (per 3/27/01 ct's order) (PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

6/19/01 Filed original and 15 copies Petitioner State of Alaska, Petitioner Cominco Alaska Incorporated's supplemental brief of 13 pages, served on 6/18/01. (per 3/27/01 ct's order) (PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

8/3/01 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) The Alaska Dept of Environment Conservation's ("ADEC") motion for leave to file a response to the EPA's Hardesty Declaration is DENIED. We further order, however, ADEC and Cominco Alaska, Inc. ("Cominco") to file a response to the Hardesty Declaration that states whether they agree that the material provided by the EPA and described in the Hardesty Declaration constitutes the complete administrative record in this proceedings as both a factual and legal matter. If ADEC and Cominco contend that the materials described in the Hardesty Declaration do not constitute a complete administrative record, they are further ordered to provide legal authority for

this proposition and evidence that additional material exists. In addition, they are ordered to provide legal authority for any proposed form of relief, such as discovery, they may seek to remedy any asserted failure by the EPA to provide the complete administrative record. ADEC and Cominco are further ordered to file their responses or a combined response within 14 days of the date hereof. The EPA may file a response within 10 days thereafter. IT IS SO ORDERED. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

2/28/02 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) Having considered the recent submissions of the parties agreeing to the factual record on appeal and the brfs filed beginning in 6/2000 (almost two yrs ago), we have determined that supp briefing would be of assistance in the determination of the cause. Therefore, it is ORDERED that each side file a supp brf not to exceed 25 pgs within 28 days of the date hereof on the following question: whether it is the state of Alaska (through ADEC) or the EPA that bears the ultimate legal authority and responsibility under the Clean Air Act to determine whether an individual Prevention of Significant Deterioration permit issued by Alaska pursuant to its State Implementation Plan (SIP) meets the requirements of the Clean Air Act or the SIP. If any party desires additional oral argument in this matter, it should file a request, along with a brf statement of the reasons it believes additional argument is necessary. It is so ORDERED. (served PANEL; phoned and faxed to csls at 3:00p.m.; c.c. Front Counter) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

3/28/02 Filed Original and 15 copies of Respondent EPA's Supplemental brief of 25 pages pursuant to ct's order of 2/28/02; served on 3/27/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

3/29/02 Filed Original and 15 copies Petitioner Cominco Alaska Incorporated's supplemental brief of 25 pages, served on 3/28/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

4/1/02 Filed Original and 15 copies Petitioner State of Alaska in 00-70166 supplemental brief of 10 pages, served on 3/28/02. (per 2/28/02 order of the ct) (PANEL) [00-70166, 00-70169, (af) [00-70169 00-70175 00-70301]

4/1/02 Filed original and 15 copies Petitioner State of Alaska in 00-70166 supplemental brief of 10 pages, served on 3/28/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) This cs is hereby resubmitted as of the date of this order. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 Case resubmitted on this date to Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD. (See previous deferral of submission.) Order filed: 7/30/02. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 FILED OPINION: DENIED. (Terminated on the Merits after Oral Hearing; Enforced; Written, Signed, Published. Stephen R. REINHARDT; Kim M. WARDLAW, author; Ronald M.

	GOULD.) FILED AND ENTERED JUDGMENT. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]
9/23/02	MANDATE ISSUED [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]
11/4/02	Received notice from Supreme Court: petition for certiorari filed on 10/25/02 and placed on the docket 10/31/02; Supreme Court No. 02-658. (CASEFILES) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]
2/28/03	Received notice from Supreme Court, petition for certiorari GRANTED on 2/24/03. Supreme Court No. 02-658. (faxed to PANEL) (re-entered) (af) [00-70166 00-70169 00-70175 00-70301]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-70301

TECK COMINCO ALASKA INCORPORATED,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

CAROL M. BROWNER, Administrator,
and CHUCK CLARKE, Regional Administrator,
Region 10, of the United States
Environmental Protection Agency,
Respondents.

DOCKET ENTRIES

DATE	PROCEEDINGS
3/16/00	FILED PETITION FOR REVIEW DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL, NOTIFIED RESPONDENTS OF FILING, SENT PETITIONER CIVIL APPEALS DOCKETING STATEMENT. setting schedule as follows: petitioners' opening brief is due 6/5/00; respondents' brief is due 7/5/00; petitioner's optional reply brief is due 7/18/00. [00-70301] (vt) [00-70301]
3/20/00	Filed joint mtn to consolidate (00-70166/70169/70175/70301) set coordinated briefing

schedule, and extend deadline for filing of the certified index to record; served 3/17/00. (MOATT via PROMO) [00-70166, 00-70169, 00-70175, 00-70301] [3873459] (rc) [00-70166 00-70169 00-70175 00-70301]

4/4/00 Received Respondent EPA's opposition to motion for stay and cross-motion to dismiss; served on 4/3/00. (opposition exceeds FRAP limits - motion pending - MoAtt) [00-70166, 00-70169, 00-70175, 00-70301] (dl) [00-70166 00-70169 00-70175 00-70301]

4/6/00 Received Respondent EPA's addendum to opposition to petitioner's motion for stay and cross-motion to dismiss; served on 4/5/00. (MoAtt) [00-70166, 00-70169, 00-70175, 00-70301] (dl) [00-70166 00-70169 00-70175 00-70301]

4/17/00 Received Cominco Alaska in 00-70169, 00-70175, 00-70301 reply in opposition to motion to dismiss. served on 4/14/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

4/19/00 Received State's opposition to EPA'S motion to dismiss petitions. (served on 4/14/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

4/28/00 Received Respondents' reply in support of mtn to dismiss petitions for lack of subject matter jurisdiction; unopposed mtn of respondents for leave to file an oversized reply in support of mtn to dismiss petition for lack of subject matter jurisdiction; respondents' ntc of suppl administrative action; served on 4/27/00. (MOATT) [00-70166, 00-70169, 00-70175, 00-70301] (rc) [00-70166 00-70169 00-70175 00-70301]

5/9/00 Received Cominco Alaska opposition to motion to dismiss. (served on 5/8/00 MOATT [00-70166, 00-70169, 00-70175, 00-70301] (vt) [00-70166 00-70169 00-70175 00-70301]

6/1/00 Filed order (Harry PREGERSON, Ferdinand F. FERNANDEZ, Kim M. WARDLAW): Petitioner the State of Alaska Department of Environmental Conservation ("ADEC"), petitioner Cominco Alaska Incorporated ("Cominco") and respondents the U.S. Environmental Protection Agency, Carol M. Browner and Chuck Clarke's (EPA) 3/20/00 joint motion to consolidate petition 00-70166, 00-70169, 00-70175 and 00-70301 is granted. Petition nos. 00-70166, 00-70169, 00-70175 and 00-70301 are consolidated. Petitioner Cominco's unopposed motion for leave to file an oversized motion for stay is granted. The Clerk shall file Cominco's 3/20/00 motion for stay. Petitioner ADEC's March 31, 2000 motion for joinder in Cominco's motion for stay of the EPA's 12/10/99, 2/8/00 and 3/7/00 orders pending appeal is granted. Respondents' March 28, 2000 motion for extension of time to file the response to petitioners' motion for stay is granted. Respondents' unopposed 4/4/00 motion for leave to file an oversized opposition to petitioners' motion for stay is granted. The Clerk shall file respondents' 4/4/00 opposition to petitioners' motion for stay, and respondents cross-motion to dismiss. The Clerk shall also file respondents' 4/6/00 addendum to its opposition to the motion for stay, and respondents' motion to dismiss. Petitioner Cominco's unopposed motion to file an oversized reply in support of its motion to dismiss is granted. The Clerk shall file the reply received 4/28/00. Petitioner Cominco's motion to file a surreply in opposition to respondents' motion to dismiss is granted. The Clerk

shall file the surreply rec'd 5/9/00. The Clerk shall file petitioner ADEC's 4/19/00 opposition to respondents' motion to dismiss. Petitioner ADEC's motion to file a surreply in opposition to respondents' motion to dismiss is granted. The surreply was filed 5/11/00. Petitioner ADEC's motion for oral argument is denied. Petitioner Cominco's March 20, 2000 motion to stay respondent EPA's 12/10/99, 2/8/00 and 3/7/00 orders pending appeal is denied. Respondents' 4/4/00 cross-motion to dismiss is denied. The 3/20/00 joint motion of Petitioners ADEC, Cominco and respondent EPA to extend the time to file the certified index to the admin record is granted. The certified index to the admin record is due 6/26/00. Respondents' 4/3/00 motion to stay filing of the certified index to the admin record is denied as moot. The following briefing schedule shall govern these consolidated petitions for review: the opening briefs are due 6/26/00; the answering brief is due 7/26/00. Requests for extension of time will be looked upon with disfavor. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. All briefs shall comply with the page and type-volume limitations set forth in FRAP 32(a)(7). If all parties on a side file a joint brief, these parties may, in accordance with Ninth Circuit Rule 28-4, timely move for enlargement of size of 5 monotype pages or 1,400 words. Requests for enlargement of size greater than 5 pages or 1,400 words will be looked upon with extreme disfavor. MOTION FOR STAY DENIED; MOTION TO DISMISS DENIED. [00-70166, 00-70169, 00-70175, 00-70301] (ft) [00-70166 00-70169 00-70175 00-70301]

6/29/00 Filed original and 15 copies Petitioner State of Alaska in 00-70166, Petitioner Cominco Alaska

in 00-70169, Petitioner Cominco Alaska Inc. in 00-70175, Petitioner Cominco Alaska in 00-70301 opening brief (Informal: n) 57 pages and five excerpts of record in 2 volumes; served on 6/26/00 [00-70166, 00-70169, 00-70175, 00-70301] (je) [00-70166 00-70169 00-70175 00-70301]

8/17/00 Filed original and 15 copies respondent EPA in 00-70166, 00-70169, 00-70175, 00-70301 in 66 pages brief, 5 Exc. in 1 vol; served on 8/16/00. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

9/7/00 Filed original and 15 copies State of Alaska, Cominco Alaska, Cominco Alaska Inc., Cominco Alaska's reply brief, (Informal: no) 46 pages; with 5 Sup. Exc of Record in 1 volume; served on 9/5/00. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

1/10/01 Filed Order (Deputy Clerk: gb) Petitioner's motion to expedite and decision on appeal is DENIED. Petitioner's motion to allow longer oral argument is also DENIED. NANA Regional Corporation, Inc.'s motion for leave to file an amicus letter brief is GRANTED. This letter brief is hereby submitted. NANA Regional Corporation, Inc. shall be notified by mail through its general counsel, Jacquelyn R. Luke, at 1001 E. Benson Blvd., Anchorage, AK 99508 (907)265-4148. The Native Village of Kivalina's motion for leave to file an amicus letter brief is GRANTED. This letter brief is hereby submitted. The Native Village of Kivalina shall be notified by mail through its atty and trustee, Michael J. Frank, at 1026 West 4th Ave., Ste 201, Anchorage, AK 99501 (907)276-4244x116) (faxed to PANEL and phoned counsels at 3:00p.m.) [00-

70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

1/11/01 FILED CERTIFIED COPY OF ADMINISTRATIVE RECORD ON APPEAL: 1 CARTON CONTAINING 87 DOCUMENTS.(ORIGINAL) [00-70166] [00-70166] (sd) [00-70166]

2/9/01 Received Andrew J. Doyle for Respondent EPA letter dated 2/8/01 re: current event relating to the Dec 10, 99 prevention of significant deterioration construction permit (No.9932-AC005) that Petitioner State of Alaska, Dept of Environmental Conservation issued to Petitioner Cominco Alaska, Inc. (with attachment) (faxed to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

2/13/01 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD [00-70166, 00-70169, 00-70175, 00-70301] (ss) [00-70166 00-70169 00-70175 00-70301]

3/27/01 Filed Order (FOR PUBLICATION) (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) Within 60 days of this order, the EPA may either (1) submit a complete administrative record which will allow this Court to review the justification for the EPA's decision to issue the Orders before us; (2) withdraw the Orders that are the subjects of these petitions or (3) file an enforcement action, (cite), in the appropriate U.S. District Court....(Please see casefile for complete text) Should the EPA opt to submit the administrative record rather than to pursue an enforcement action or to withdraw its Orders, petitioners and respondents are ordered to file, within 21 days of such submission, supplemental briefs, not to exceed 15 pgs, assessing the im-

pact, if any, (cite), on the question whether it is the EPA or ADEC which has the ultimate authority to make BACT determinations. The parties shall provide notice of the status of these proceedings to this Court within 60 days hereof. Submission of this matter is hereby vacated until further notice by this Court. IT IS SO ORDERED. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

6/19/01 Filed original and 15 copies Respondent EPA's supplemental brief of 11 pages, served on 6/18/01. (per 3/27/01 ct's order) (PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

6/19/01 Filed original and 15 copies Petitioner State of Alaska, Petitioner Cominco Alaska Incorporated's supplemental brief of 13 pages, served on 6/18/01. (per 3/27/01 ct's order) (PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

8/3/01 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) The Alaska Dept of Environment Conservation's ("ADEC") motion for leave to file a response to the EPA's Hardesty Declaration is DENIED. We further order, however, ADEC and Cominco Alaska, Inc. ("Cominco") to file a response to the Hardesty Declaration that states whether they agree that the material provided by the EPA and described in the Hardesty Declaration constitutes the complete administrative record in this proceedings as both a factual and legal matter. If ADEC and Cominco contend that the materials described in the Hardesty Declaration do not constitute a complete administrative record, they are further ordered to provide legal authority for

this proposition and evidence that additional material exists. In addition, they are ordered to provide legal authority for any proposed form of relief, such as discovery, they may seek to remedy any asserted failure by the EPA to provide the complete administrative record. ADEC and Cominco are further ordered to file their responses or a combined response within 14 days of the date hereof. The EPA may file a response within 10 days thereafter. IT IS SO ORDERED. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

2/28/02 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) Having considered the recent submissions of the parties agreeing to the factual record on appeal and the brfs filed beginning in 6/2000 (almost two yrs ago), we have determined that supp briefing would be of assistance in the determination of the cause. Therefore, it is ORDERED that each side file a supp brf not to exceed 25 pgs within 28 days of the date hereof on the following question: whether it is the state of Alaska (through ADEC) or the EPA that bears the ultimate legal authority and responsibility under the Clean Air Act to determine whether an individual Prevention of Significant Deterioration permit issued by Alaska pursuant to its State Implementation Plan (SIP) meets the requirements of the Clean Air Act or the SIP. If any party desires additional oral argument in this matter, it should file a request, along with a brf statement of the reasons it believes additional argument is necessary. It is so ORDERED. (served PANEL; phoned and faxed to csls at 3:00p.m.; c.c. Front Counter) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

3/28/02 Filed Original and 15 copies of Respondent EPA's Supplemental brief of 25 pages pursuant to ct's order of 2/28/02; served on 3/27/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

3/29/02 Filed Original and 15 copies Petitioner Cominco Alaska Incorporated's supplemental brief of 25 pages, served on 3/28/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

4/1/02 Filed Original and 15 copies Petitioner State of Alaska in 00-70166 supplemental brief of 10 pages, served on 3/28/02. (per 2/28/02 order of the ct) (PANEL) [00-70166, 00-70169, (af) [00-70169 00-70175 00-70301]

4/1/02 Filed original and 15 copies Petitioner State of Alaska in 00-70166 supplemental brief of 10 pages, served on 3/28/02. (Fedex to PANEL) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 Filed Order (Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD) This cs is hereby resubmitted as of the date of this order. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 Case resubmitted on this date to Stephen R. REINHARDT, Kim M. WARDLAW, Ronald M. GOULD. (See previous deferral of submission.) Order filed: 7/30/02. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

7/30/02 FILED OPINION: DENIED. (Terminated on the Merits after Oral Hearing; Enforced; Written, Signed, Published. Stephen R. REINHARDT; Kim M. WARDLAW, author; Ronald M.

GOULD.) FILED AND ENTERED JUDGMENT. [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

9/23/02 MANDATE ISSUED [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

11/4/02 Received notice from Supreme Court: petition for certiorari filed on 10/25/02 and placed on the docket 10/31/02; Supreme Court No. 02-658. (CASEFILES) [00-70166, 00-70169, 00-70175, 00-70301] (af) [00-70166 00-70169 00-70175 00-70301]

2/28/03 Received notice from Supreme Court, petition for certiorari GRANTED on 2/24/03. Supreme Court No. 02-658. (faxed to PANEL) (re-entered) (af) [00-70166 00-70169 00-70175 00-70301]

COMINCO ALASKA, INCORPORATED.
INDEX TO THE ADMINISTRATIVE RECORD

A. EPA NOTICES AND ORDERS

Docmt. No.	Date	Document
1	12/10/99	Findings of Noncompliance and Order w/cover letter to Michele Brown, AK. Dept. of Environmental Conservation (ADEC) from Chuck Findley, U.S. Environmental Protection Agency (EPA)
2	12/10/99	Three fax confirmation sheets sending Findings of Noncompliance and Order to Michele Brown, Cam Leonard, Tom Chapple and Rick Albright
3	2/8/00	Letter to Michele Brown, ADEC from Chuck Findley, EPA re: PSD permit and Finding of Noncompliance and Order [On file with Court as EPA's Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 13.]
4	2/8/00	Three fax confirmation sheets to Tom Chapple, Michele Brown, Cam Leonard sending 2/8/00 letter
5	2/8/00	Administrative Order w/cover letter to Norman Maloney, Reg. Agent for Cominco from Chuck Findley, EPA
6	2/8/00	Six fax confirmation sheets to Tom Chapple, Michele Brown, Larry Hartig, John Key, Cameron Leonard, and Doug Horswell sending Administrative Order

Docmt. No.	Date	Document
7	3/7/00	Amended Administrative Order w/cover letter to Robert Connery, Esq. from Chuck Findley, EPA
8	3/7/00	Letter to Norman Mahoney sending Administrative Order
9	3/7/00	Fax confirmation sheet to John Key, Larry Hartig, Bob Connery, Michel [sic] Brown, Marcia Combes, Karen Blanchard, Greg Foote, and Carol Holmes
10	4/25/00	Letter to Michele Brown, ADEC from Chuck Findley, EPA re: withdrawal of 12/10/99 Order [On file with Court as EPA's Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 23.]

B. ADEC ANALYSIS, PROPOSED AND FINAL PERMITS

Docmt. No.	Date	Document
11	7/27/94	Letter to Charlotte MacCay, Cominco from Leonard Verrelli, ADEC sending the findings of ADEC re: permit
12	3/27/96	Letter to Jack Coutts, ADEC from D. J. Charlton, Cominco re: a production rate increase
13	4/2/96	Letter to D. J. Charlton, Cominco from Alfred Bohn, ADEC re: Pre-Construction Waiver for Production Rate Increase
14	12/4/96	ADEC Permit to Operate No. 9332-AA003, Amendment No. 2

Docmt. No.	Date	Document
15	1/17/96 [sic]	ADEC Air Quality Control Permit to Operate No. 9511-AA007 Kensington Mine
16	5/19/98	Letter to Paul Dusenbury, Cominco from Robert Cannone, ADEC re: tests on gyratory crusher
17	5/4/99	ADEC's Preliminary Technical Analysis Report for Air Quality Control Construction Permit No. 9932-AC005 [On file with Court as EPA's Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 5.]
18	5/4/99	ADEC's Air Quality Construction Preliminary Permit No. 9932-AC005
19	7/29/99	Memo to Jim Baumgartner, ADEC from John Stone, ADEC re: Excluded Pre-Construction Monitoring
20	8/5/99	Memo to Tom Chapple, ADEC from Jim Baumgartner, ADEC re: Cominco Red Dog Mine Particulate Matter Impacts from the Production Rate Increase Project and Associated Activities
21	8/10/99	Memo to Jim Baumgartner, ADEC from Brian Renninger, ADEC re: Response to BACT Section of Appendix A of Cominco's Comments on Preliminary Technical Analysis Report for Air Quality Control Construction Permit No. 9932-AC005, Entitled Presentation to ADEC of Major Discretionary Air Quality Issues Pending Decision at Cominco's Red Dog Mine

Docmt. No.	Date	Document
22	8/11/99	Memo to Tom Chapple, ADEC from John Stone, ADEC re: review of ADEC's preliminary decision for BACT
23	8/12/99	Memo to Cominco Red Dog Mine File from Jeff Anderson, ADEC re: Owner-Requested Limits and Ambient Impacts for Specified Stack Parameters
24	8/13/99	Memo to John Stone from Bill Walker, ADEC re: Particulate for 5 MW Diesels
25	8/13/99	Memo to John Stone from Brian Renninger, ADEC re: Follow-up Recommendation for the Removal of the 109,660,000 kW-hr Limit from Four of Cominco's Wartsila 5 MW Generator Sets
26	8/13/99	Cominco Red Dog Mine Power Plant NOx Emission Comparison PSD BACT Options
27	8/19/99	Memo to John Stone from Jim Baumgartner, ADEC re: Consideration of Cominco's Request to Revise the Carbon Monoxide Emission Limit for Wartsila Sources MG-1 Through MG-6 and MG-17
28	8/23/99	ADEC's Draft Response to Comments, Cominco Alaska Red Dog Mine Production Rate Increase Project Air Quality Construction Permits No. 9932-AC005

Docmt. No.	Date	Document
29	9/1/99	ADEC's Final Draft Technical Analysis Report for Air Quality Control Construction Permit, No. 9932-AC005
30	9/3/99	ADEC Air Quality Construction Permit Final Draft
31	9/20/99	Cominco Alaska Inc. Comments on Mine Site Air Permit, TAR and Response to Comments
32	12/10/99	ADEC's Air Quality Construction Permit No. 9932-AC005 [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 12.]
33	12/10/99	ADEC's Final Technical Analysis Report for Air Quality Control Construction Permit No. 9932-AC005 [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 10.]
34	12/10/99	ADEC's Response to Comments Cominco Alaska Red Dog Mine Production Rate Increase Project Air Quality Construction Permit No. 9932-AC005

C. COMINCO PERMIT APPLICATION AND RELATED SUBMISSIONS

Docmt. No.	Date	Document
35	12/97	Appendix C, Source Test Results from Cominco's Application for Air Quality Control Operating Permit (Title 5)

Docmt. No.	Date	Document
36	6/98	Application for an Air Quality Control Construction Permit: Production Rate Increase for Red Dog Mine
37	10/98	Air Quality Control Construction Permit: Response to 7/27/98 ADEC Request for More Information for Red Dog Mine
38	11/98	Air Quality Control Construction Permit: Response to 11/13/98 ADEC Request for More Information for Red Dog Mine
39	1/99	Air Quality Control Construction Permit: Response to 12/7/98 ADEC Request for More Information for Red Dog Mine
40	2/99	Amendment and Supplemental Submission for the 6/98 Production Rate Increase Permit Request for Red Dog Mine
41	2/99	Air Quality Control Construction Permit: Response to 1/28/99 ADEC Request for More Information for Red Dog Mine
42	4/15/99	Letter to Jim Baumgartner, ADEC from Al Trbovich, Hoefler Consulting Group re: Amendment III for the 6/98 Production Rate Increase Permit Request
43	6/99	Comments on Draft Air Quality Control Construction Permit No. 9932-AC005

Docmt. No.	Date	Document
44	6/99	Comments on Preliminary Technical Analysis Report for Air Quality Control Construction Permit No. 9932-AC005 for Red Dog Mine
45	6/22/99	Presentation to ADEC of Major Discretionary Air Quality Issues Pending Decision at Cominco's Red Dog Mine

D. CORRESPONDENCE

Docmt. No.	Date	Document
46	6/2/99	Letter to Jim Baumgartner, ADEC from John Notar, Department of Interior (DOI) sending comments on proposed construction permit [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 4.]
47	7/29/99	Letter to Tom Chapple, ADEC from Anita Frankel, EPA re: EPA's concerns about proposed permit
48	9/15/99	Letter to Tom Chapple, ADEC from Anita Frankel, EPA re: EPA's concerns about final draft permit [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 6.]

Docmt. No.	Date	Document
49	9/20/99	Letter to Anita Frankel, EPA from John Bunyak, DOI re: DOI's concerns regarding proposed construction permit [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 11.]
50	9/28/99	Letter to Tom Chapple, ADEC from Anita Frankel, EPA sending EPA's staff review of ADEC's Technical Analysis Report and PSD Permit for the Production Rate Increase [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 7.]
51	10/8/99	Letter to Anita Frankel, EPA from Charlotte MacCay, Cominco re: comments on EPA's Review of Cominco PSD permit [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 8.]
52	10/18/99	Letter to John Key, Cominco from Robert Connery, Holland & Hart, LLP re: EPA Usurpation of Alaska's Program for the PSD
53	10/29/99	Memo to Chuck Findley, EPA from Charlotte MacCay, Cominco re: EPA's Oversight of the ADEC PSD Permit for the Red Dog Mine, including memo to EPA from Bob Connery and Larry Volmert, Holland & Hart re: oversight

Docmt. No.	Date	Document
54	11/3/99	Letter to Michelle [sic] Brown, ADEC from Robert Connery, Holland & Hart re: Alaska's Role in PSD
55	11/10/99	Letter to Michele Brown, ADEC from Chuck Findley, EPA re: 10/21/99 mtg with Cominco [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 9.]
56	No date	Letter to Chuck Clark [sic], EPA from John Key, Cominco re: 11/12/99 meeting on air permitting issues and sending economic information
57	11/19/99	Letter to Charles Clarke, EPA from Congressman Don Young re: permit for Cominco Alaska's Red Dog Mine expansion
58	12/21/99	EPA's response to Congressman Young
59	12/7/99	Faxed memo to Chuck Clark [sic], EPA from Charlotte MacCay, Cominco sending 12/6/99 opinion of Robert Connery and Lawrence Volmert, Holland & Hart re: EPA Authority to Bring Enforcement Action in Federal District Court under Sec. 167 Without Prior Issuance of Administrative Order
60	12/27/99	Letter to Eric Yould, Alaska Rural Electric Cooperative Association (ARECA) from Michele Brown, ADEC responding to concerns of rural utilities

Docmt. No.	Date	Document
61	1/5/00	Letter to Chuck Clarke and Chuck Findley, EPA from Michele Brown, ADEC re: concern over EPA's letter and Order prohibiting Alaska from issuing a PSD permit
62	1/12/00	Letter to Erick Yould, ARECA from Chuck Findley, EPA, clarifying EPA's position re: Prevention of Significant Deterioration (PSD) permits and applicability of Best Available Control Technologies (BACT)
63	1/14/00	Letter to Carol Browner, EPA from Gov. Tony Knowles, State of Alaska re: requesting review of EPA's Order
64	2/16/00	Letter to Chuck Clarke, Chuck Findley, Doug Hardesty from Robert Connery re: Request for Stay [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 1.]
65	3/1/00	Letter to Julie Matthews, EPA from Larry Hartig re: Generator No. 7 (MG-17) Construction Schedule [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 22.]
66	3/14/00	Ltr to Charles Clarke, EPA from John Key, Cominco re: request for a stay
67	3/14/00	Ltr to Julie Matthews, EPA from Lawrence Hartig, Esq. re: filing a motion for stay

Docmt. No.	Date	Document
68	4/26/00	Ltr to John Key, Cominco from Barbara McAllister, EPA re: construction schedule and request for stay [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 24.]

E. EPA GUIDANCE AND BACT PROCESS

Docmt. No.	Date	Document
69	12/14/83	Memo to Regional Counsels, et al., EPA from Michael Alushin and Edward Reich, EPA re: Guidance on Enforcement of Prevention of Significant Deterioration Requirements under the Clean Air Act
70	7/15/88	Procedures for EPA to Address Deficient New Source Permits under the Clean Air Act [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 20.]
71	10/90	Draft New Source Review Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting

Docmt. No.	Date	Document
72	1/22/93	Memo to Scott Fulton, EPA from Raymond Ludwiszewski, EPA re: EPA Enforcement Authority with Respect to Sources Based on a Finding of a State's Failure to Comply with New Source Requirements: The Effect of the 1990 Amendments-- Legal Opinion [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 16.]
73		Tables re: NOx controls on engines
74		Permit for Fuel Burning Equipment, State of Connecticut, Department of Environmental Protection, Bureau of Air Management

F. SIP APPROVALS

Docmt. No.	Date	Document
75	7/5/83	Approval and Promulgation of Implementation Plans; Alaska, Final Rule, 48 Fed. Reg. 30,623 (1983)
76	4/24/84	Approval and Promulgation of Implementation Plans; Alaska, Final Rule, 49 Fed. Reg. 17,497 (1984)
77	4/26/91	Approval and Promulgation of State Implementation Plans: Alaska, Final Rule, 56 Fed. Reg. 19,284 (1991)
78	2/16/95	Approval and Promulgation of Implementation Plans: Alaska, Direct Final Rule, 60 Fed. Reg. 8943 (1995)

Docmt. No.	Date	Document
79	11/18/98	Approval and Promulgation of State Implementation Plans; Alaska, Final Rule, 63 Fed. Reg. 63,983 (1998)

G. MISCELLANEOUS

Docmt. No.	Date	Document
80	5/11/94	Delegation 7-37, CAA Administrative Enforcement Actions: New Source Review (NSR) Orders
81	5/11/94	Delegation 7-38, CAA Prevention of Significant Deterioration: Administrative Enforcement
82	3/21/96	Delegation R10 1265.1, CAA Regulatory Enforcement Orders Enforcing NSR and PSD Requirements
83	1998	Cominco's Annual Report, Solid Progress in a Challenging Year
84	9/8/99, 2/3/00	Information from Cominco's website
85		Materials provided by Cominco at 10/21/99 meeting: - Info on PSD permitting for 1988, 1994 and 1999 - Presentation to Alaska Department of Environmental Conservation of Major Discretionary Air Quality Issues Pending Decision at Cominco's Red Dog Mine - Legal research materials

Docmt. No.	Date	Document
86	10/26/99	Newspaper article from Anchorage Daily News on Cominco Ltd. [On file with Court as EPA Opposition to Motion to Stay and Cross-Motion to Dismiss, Att. 21.]
87	2/2/00	Delegation of Authority, Cominco Red Dog Mine

ALASKA DEPARTMENT
OF ENVIRONMENTAL CONSERVATION
Juneau, Alaska

PRELIMINARY TECHNICAL ANALYSIS REPORT

For Air Quality Control Construction Permit
No. 9932-AC005

Cominco Alaska, Inc.
Prevention of Significant Deterioration
Red Dog Mine Production Rate Increase

May 4, 1999

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ABBREVIATIONS AND ACRONYMS

BACT	Best Available Control Technology
CEM	Continuous Emission Monitor
CFR	U.S. Code of Federal Regulations
CO	Carbon Monoxide
DEC	Alaska Department of Environmental Conservation
EGR	Exhaust Gas Re-circulation
EPA	U.S. Environmental Protection Agency
ESP	Electrostatic Precipitator
FITR	Fuel Injection Timing Retard
hp	Horsepower
hr	Hour
H_2S	Hydrogen Sulfide
ISO Conditions	288K, 60 pct relative humidity and 101.3 kilopascals pressure
KW	Kilowatts
LAER	Lowest Available Emission Rate
MMBtu	Million British thermal units
NAAQS	National Ambient Air Quality Standards
NESHAP	National Emission Standards for Hazardous Air Pollutants
NSCR	Non-Selective Catalytic Reduction
NSPS	New Source Performance Standards
NO	Nitric Oxide
NOx	Oxides of nitrogen
NO_2	Nitrogen Dioxide
OLM	Ozone Limiting Method
OSHA	Occupational Safety and Health Administration
PM	Particulate matter
PM-10	Particulate matter (10 micrometers or less in size)
ppmdv	Parts per million, dry volume basis
PSD	Prevention of Significant Deterioration
SCO	Selective Catalytic Oxidation
SCR	Selective Catalytic Reduction

SNCR	Selective Non-Catalytic Reduction
SO_2	Sulfur Dioxide
TSP	Total suspended particulate (30 micrometers or less)
VOC	Volatile organic compounds
$\mu g/m^3$	Microgram per cubic meter

* * *

4. BEST AVAILABLE CONTROL TECHNOLOGY

The Department's goal for the best available control technology (BACT) review is to evaluate available technologies, identify BACT for the project's emission sources, and establish emission or operational limits which represent BACT. This review is conducted in accordance with State and federal rules and guidelines. In this section, the Department evaluates the available control technologies for each emission source and selects BACT. In addition, the Department assesses the level of monitoring, record keeping, and reporting necessary to ensure the applicant applies BACT.

Under the State of Alaska's PSD Provisions of the Air Quality Control Regulations, an applicant subject to preconstruction review must show that BACT will be installed and used for each new or modified source. BACT is defined as an emission limit that represents the maximum reduction achievable for each regulated air contaminant subject to preconstruction review under the PSD provisions of the Clean Air Act (CAA). For this project, BACT evaluation is required for the following contaminants: oxides of nitrogen (NOx), particulate matter (PM-10), and volatile organic compounds (VOC).

Application of BACT will not result in emission of any pollutant which would exceed the emissions allowed by any applicable federal standard listed in 40 CFR, Part 60 NSPS, and 40 CFR 61 National Emission Standards for Hazardous Air Pollutants (NESHAPS).

On a case-by-case basis, the Department, taking into account energy, environmental, and economic impacts, determines emission limits for new sources or modifications through the application of production, process, or available control systems and techniques. The Department identifies available control technology and evaluates the most effective control measure available for a stationary source for each pollutant.

The Department may propose a balanced approach reducing all air contaminants in an optimized manner, rather than achieving the maximum degree of emissions reduction for a single air contaminant.

The Department evaluates economic feasibility of BACT by comparing the control cost of each available control technology. If the Department determines that technological or economic constraints of the control system for a particular pollutant would make the imposition of an emission standard infeasible, the Department may prescribe a design, equipment, work practice, operational standard, or combination, to satisfy the requirement for BACT. The Department will set forth the emission reduction achievable through implementation of such design, equipment, work practice, or operation.

As part of a complete application, the applicant must provide an adequate demonstration that the proposed emission control system represents BACT for the project. The applicant prepares an economic comparison of available technologies by summing the annualized capital and operational costs for a given technology, and dividing the cost sum by the air contaminant emission rate reduction expected for that technology. This results in an incremental cost for comparison with other technologies analyzed, in terms of cost per ton of air contaminant reduced. The lower the cost per ton, the less expensive it is to employ that technology. The Department determines the economic feasibility threshold that reflects the appropriate site-specific level of control for the pollutant and new sources.

The methodology Cominco used to identify BACT is the five-step "top-down" methodology set forth in the U.S. EPA's proposed *New Source Review Rule Revisions* (EPA 1990). The first step is to survey alternative control techniques and identify all "available" control options. An available control option is a practical air pollution control technology or technique to the emission unit and pollutant under evaluation.

To assist in identifying available controls, Cominco and the Department reviewed the available controls listed on EPA's RACT/BACT/LAER (RBLC) Clearinghouse bulletin board where permitting agencies nationwide have listed the BACT control technologies imposed within the past five years.

The second step in the top-down approach evaluates the technical feasibility of each available control option based on source-specific factors. The Department deems as technically infeasible those control options that would clearly result in technical difficulties that preclude their successful application.

Step three determines the effectiveness of control alternatives for all options not eliminated in step two. The Department ranks the control options in order of overall control effectiveness for the pollutant under review in a "top-down" manner.

Step four considers the energy, environmental, and economic impacts of control options. The step begins with the top-ranked, technically-feasible control alternative. If the most effective control option is shown to be inappropriate due to adverse economic, environmental, or energy impacts, then it is eliminated and the next most stringent alternative is evaluated. If the most stringent technology is selected as BACT, it is not necessary to continue the analysis.

Finally, under step five, the Department proposes the most effective control option not eliminated in step four as BACT for the pollutant and emissions unit under review.

All BACT requirements, with limits, monitoring, record keeping, and reporting obligations are incorporated in Condition XI of the permit. Table 4-1 below summarizes the BACT proposed by the Department.

Table 4-1 Department BACT Limits

Equipment	NOx	CO	PM-10	VOC
MG-5 & MG-17	11 gr/kW-hr	N/A[1]	2.6 lb./hr, 10% opacity	GOP
MG-11	GOP[2]	GOP	0.05 gr/dscf, 20% opacity	
MG-12	GOP	GOP		
MG-13	GOP	GOP		
MC-1	N/A	N/A		
MG-14	GOP	GOP		
MG-15	GOP	GOP		
MG-l6	GOP	N/A		
MH-1, MH-2 & MH-3	0.035 lb/MMBtu	GOP	N/A	
MH-4, & MH-5	GOP	GOP	N/A	
MH-6 through MH-36	GOP	GOP	N/A	
MH-37 through MH-48	GOP	N/A	GOP	
MI-3	GOP	N/A	10% Visible Emissions	
MD-4	N/A	N/A	0.01 gr/dscf	NA
MD-6 & MF-3	N/A	N/A	0.01 gr/dscf	N/A
MT-1 & MT-2	N/A	N/A	N/A	Subpart Kb
MT-3	N/A	N/A	N/A	
MF-1	N/A	N/A	N/A	N/A

MF-5	N/A	N/A	Chemical Stabilization and Water-ing	N/A
MF-6	N/A	N/A	quarry-liquid application where practical, drilling - liquid application	N/A
MF-7	N/A	N/A	Covering, revegetation, watering	N/A
MF-8 & 9	No Control	No Control	No Control	No Control
MF-10	N/A	N/A	N/A	N/A
MF-11	N/A	N/A	LL and OOO	N/A
MF-12	N/A	N/A	OOO	N/A

[1] N/A - Not Applicable

[2] GOP - Good Operation Practices

4.1 BACT DETERMINATION FOR NOx

This facility is currently permitted to emit greater than 250 tons per year of NOx, and is therefore classified as a PSD Major facility under 18 AAC 50.300(c)(1). The proposed modification will increase allowable NOx emissions in excess of the 40 ton per year PSD applicability threshold specified in 18 AAC 50.300(h)(3)(b)(ii). Therefore, the Department will impose NOx BACT for the proposed NOx emission sources.

The Department evaluated several NOx control methods as BACT for the following sources: large diesel-fired engines,

small diesel-fired engines, small heaters, and the modular waste incinerator. The specific options and evaluation results are summarized in Tables 4.1-1 to 4.1-4, and discussed in detail in this section.

Table 4.1-1 Summary of NOx BACT (Large Diesel-Fired IC Engines)

Available Controls	Technically Feasible	Economically Feasible	BACT
Selective Catalytic Reduction	Yes	Yes	No[1]
Non-Selective Catalytic Reduction	No	N/A[2]	N/A
Direct Water Injection	Yes	No	No
Low NOx Modification	Yes	Yes	Yes[1]
Fuel Injection Timing Retard	Yes	Yes	No
Operation per Design	Yes	Yes	No

[1] While SCR is a technically and economically feasible control technology, Low NOx control technology was chosen as BACT due to other considerations. See the discussion below for the details.

[2] N/A - Not Applicable

Table 4.1-2 Summary of NOx BACT (Small Diesel-Fired IC Engines)

Available Controls	Technically Feasible	Economically Feasible	BACT
Selective Catalytic Reduction	No	N/A[1]	N/A
Non-Selective Catalytic Reduction	No	N/A	N/A
Direct Water Injection	No	N/A	N/A
Fuel Injection Timing Retard	Yes	No	No
Lean Burn Combustion	No	N/A	N/A
Turbocharger and After-cooler	Yes	Yes	No[2]
Operation per Design	Yes	Yes	Yes

[1] N/A - Not Applicable

[2] All of the engines are fitted with turbochargers as part of their design. Two of the engines, MG-14 and MG-15, are fitted with aftercoolers as part of their design. ADEC does not consider retrofitting the smaller engines with aftercoolers technically-feasible, due to their small size.

Table 4.1-3 Summary of NOx BACT (Small Heaters)

Available Controls	Technically Feasible	Economically Feasible	BACT
Low NOx Burner/Flue Gas Recircu-lation	Yes	No	No[1]
Staged Combustion Air	No	N/A[2]	N/A
Selective Catalytic Reduction	No	N/A	N/A
Operation Per Design	Yes	Yes	Yes[1]

[1] LNB/FGR is BACT for heaters MH-l, MH-2 due to their larger size.

[2] N/A - Not Applicable

Table 4.1-4 Summary of NOx BACT (Incinerator MI-3)

Available Controls	Technically Feasible	Economically Feasible	BACT
Staged Air Combustion	Yes	Yes	Yes[2]
Selective Non-Catalytic Reduction	No	N/A[1]	N/A
Selective Catalytic Reduction	No	N/A	N/A
Operation Per Design	Yes	Yes	Yes[2]

[1] N/A - Not Applicable

[2] Staged air combustion is integral to the incinerators design.

4.1.1 Mechanisms of NOx Formation

Combustion is defined as the rapid chemical combination of oxygen with combustible elements of a fuel. Combustion produces heat that can be manipulated to generate power. Most fuels have three combustible elements: carbon, hydrogen, and sulfur, which unite with oxygen from atmospheric air to produce heat. Atmospheric air is a mixture that contains roughly 79% nitrogen and 21% oxygen by volume. Nitrogen present in the combustion process sometimes combines with oxygen, forming oxides of nitrogen.

There are several types of oxides of nitrogen formed during the combustion process, but only two types occur in significant quantities: nitric oxide--NO, and nitrogen dioxide--NO_2. In stationary source combustion, most of the NOx formed is nitric oxide (NO), which can oxidize in the atmosphere to form NO_2, a regulated air contaminant. At high temperatures, NO formation is favored almost exclusively

over NO_2 formation, and the rate of NO_2 dissociation to NO is favored by the mechanism:

$$NO_2 + O + \text{heat} \leftrightarrow NO + O_2$$

After the flue gas exits the stack, the entrained NO may be oxidized by atmospheric ozone to form NO_2. Other complex atmospheric reactions with NO and NO_2 can also occur.

There are three mechanisms for NOx formation during combustion of certain fossil fuels. These formation mechanisms are thermal, fuel-bound, and prompt NOx. A brief discussion of each mechanism follows.

Thermal NOx Formation

The predominant mechanism in combustion reactions is thermal fixation of the atmospheric nitrogen at elevated temperatures, usually greater than 2800°F, known as thermal NOx. Production of thermal NOx is an exponential function of the flame temperature, and a linear function of the time the hot gas mixture is at that flame temperature. This mechanism follows the Zeldovich reactions, with three predominant paths for NOx formation in combustion:

$$(1)\ N_2 + O \leftrightarrow NO + N$$

$$(2)\ N + O_2 \leftrightarrow NO + O$$

$$(3)\ N + OH \leftrightarrow NO + H$$

Note that reaction (1), which is highly temperature-dependent, provides the atomic nitrogen (N) necessary for reactions (2) and (3). Note further that the reverse reactions are not favored by the presence of molecular oxygen. Therefore, in the oxidizing environment that normally prevails downstream from the actual combustion zone due to the presence of excess combustion air, the NO that has been formed is essentially fixed.

Fuel-Bound NOx

Chemically-bound nitrogen in the fuel is known as fuel-bound nitrogen. The oxidation mechanism is dependent on fuel-bound nitrogen content, fuel properties, and the stoichiometric conditions present during combustion. The most significant factors attributing fuel-bound NOx formation are chemically fuel-bound nitrogen content, and the fuel-to-air ratio during the early stages of combustion when fuel-bound nitrogen is liberated from the fuel.

As the chemically-bound nitrogen in the fuel enters the flame zone, the fuel is burned into small reactive, nitrogenous organic molecules which react with oxygen to form NO. In a reduction environment where insufficient oxygen is present for complete combustion, such as the fuel-rich zone of combustion, the nitrogenous fuel fragments encounter and react with each other, and convert the fuel-bound nitrogen to molecular nitrogen (N_2).

Fuel-bound nitrogen can be a significant source of NOx emissions from fossil fuels such as residual oil and coal, but significantly less fuel-bound nitrogen is contained in natural gases. The Department typically uses the most conservative technique to estimate NOx emissions due to fuel-bound nitrogen--to assume that all nitrogen in the fuel is converted to NOx during combustion.

Prompt NOx

Prompt NOx is produced by the formation of an intermediary such as hydrogen cyanide (HCN), through the reaction of nitrogen radicals and hydrocarbons (HC),

$$NO + HC + H_2 - HCN + H_2O$$

followed by the oxidation of the HCN to NO. The formation of prompt NOx has a weak temperature dependence and a short lifetime of several microseconds. It is only significant in very fuel-rich flames, which are inherently low NOx emitters.

4.1.2 NOx Control Methods

This section describes the control technologies that may be available to reduce NOx emissions from one or more of the source categories listed by the applicant. The Department's evaluation of the availability and effectiveness of these controls for each of the applicant's source categories is provided in Sections 4.1.3 through 4.1.5.

Selective Catalytic Reduction (SCR)

Selective Catalytic Reduction (SCR) is a potential emission control technology for turbines and other internal combustion sources. SCR systems use ammonia to selectively reduce NOx to N_2. This technology reduces both thermal and fuel-bound NO_2. SCR injects ammonia or urea into the exhaust before the exhaust enters a catalyst bed made with vanadium, titanium, or platinum. The reduction reaction occurs when the flue gas passes over the catalyst bed where the NOx and ammonia combine to become nitrogen, oxygen, and water as follows:

$$4NO + 4NH_3 + O_2 \rightarrow 4N_2 + 6H_2O$$

$$2NO_2 + 4NH_3 + O_2 \rightarrow 3N_2 + 6H_2O$$

The required catalyst bed temperature is dependent on the type of catalyst used, and must be maintained within a narrow temperature range for effectiveness. Manufacturers tailor their catalyst design for the temperature range expected. A metal oxide catalyst, such as vanadium or titanium is effective between approximately 600 °F and 750 °F. For a wider temperature range, zeolite catalysts have been effective in the 800 °F to 1200 °F temperature range.

Temperature dramatically affects NOx reduction because the catalyst exhibits optimum performance within a narrow temperature range. Below this optimum range, the catalyst activity is greatly reduced, allowing unreacted ammonia to "slip" through. This slip results in increased ammonia concentration in the exhaust gas that is discharged into the

atmosphere. Above the range, ammonia begins to be oxidized to form additional NOx. Further excessive temperatures may damage the catalyst.

In addition to tight operating temperature controls, the SCR process requires good control and continual adjustment of the ammonia injection rate to match the rate of NOx formation. An ammonia deficiency causes nitric oxide to react preferentially with the excess oxygen, while an ammonia surplus leads to additional ammonia slip.

Exposing a catalyst to sulfur-bearing fuels and ammonia forms ammonia salts. These salts foul the surface of the catalyst, rendering it useless and causing premature replacement. Sulfur-tolerant SCR catalysts are available, but are composed of vanadium pentoxide, a hazardous substance. These catalysts are still susceptible to some ammonium sulfate fouling. The spent vanadium pentoxide catalyst would have to be shipped off-site for disposal. To address this concern, many catalyst vendors operate exchange programs where spent catalysts are exchanged for new catalysts at a reduced price. Exchange programs alleviate customer waste disposal concerns and allow the vendor to recycle the precious metals that make up many of the catalysts.

In summary, successful operation of an SCR system occurs if the catalyst is exposed to an exhaust stream that is not an oxidizing environment. The injection of a reducing agent, most commonly ammonia (NH_3), causes NO to preferentially react with the agent to form nitrogen and water, rather than reacting with the excess oxygen. SCR requires a narrow temperature range to achieve optimum catalytic performance. SCR may be used in conjunction with reductions from steam or water injection, or combustion modifications.

Carefully designed SCR systems achieve NOx reduction efficiencies as high as 90%, with ammonia slip vendor guarantees of no greater than 10 ppm available. Conservative reductions are 80% control efficiency. This technology

has not been applied in Alaska, though the Department knows of no technical difficulty particular to Alaska that would prevent SCR use.

Non-Selective Catalytic Reduction (NSCR)

Non-selective Catalytic Reduction (NSCR), sometimes called a three-way catalyst, reduces NOx emissions 80% to 90% at a temperature between 800 and 1200 degrees F. NSCR systems use a mixture of platinum and rhodium catalyst, and carbon monoxide and hydrocarbons (CH_4) as reducing agents contained in the flue gas, forming N_2, H_2O and carbon dioxide. The chemical reaction process is not fully understood, but can be represented in the following basic formulas:

$$CH_4 + 4NO_2 \rightarrow CO_2 + 4NO + 2H_2O$$

$$CH_4 + 2O_2 \rightarrow CO_2 + 2H_2O$$

$$CH_4 + 4NO_2 \rightarrow CO_2 + 2N_2 + 2H_2O$$

$$2CO + 2NO \rightarrow 2CO_2 + N_2$$

$$2H_2 + 2NO \rightarrow 2H_2O + N_2$$

NSCR is only effective in a fuel-rich, preferably gas-fired, non-variable load combustion. The air-to-fuel ratio must be at or close to stoichiometric to provide adequate concentration of reducing agents in the exhaust gas. Stoichiometric combustion produces exhaust gas nearly depleted of oxygen (less than four percent oxygen). The inability to control air-to-fuel ratio for varying loads limits NSCR application. NSCR is best known for its application in reducing NOx from automobile exhaust. NSCR uses no reactant for the control of NOx.

Selective Non-Catalytic Reduction (SNCR)

Selective non-catalytic reduction (SNCR) is a thermal denitrification process that also involves the injection of ammonia or urea into the exhaust gases. The ammonia or urea reduces NOx to N_2 within a narrow temperature range of

1600 to 2000°F without a catalyst. At these temperatures, 80 to 90% NOx emission reduction can be achieved. Since the optimum reaction temperature is very high, the applicability of SNCR is primarily restricted to large industrial boilers.

As with SCR, SNCR requires transportation, handling, and storage of ammonia, a hazardous substance. There is a potential of ammonia slip in the exhaust gas, increasing ammonia levels in the ambient air. The other technical problem for most applications is the physical ammonia or urea injection location. For equipment operating at various loads, the proper injection temperature "window" physically moves within the combustion zone and the exhaust ductwork, requiring multiple injection locations.

Direct Water Injection/Low NOx Modification

Direct Water Injection lowers the peak flame temperature by providing a heat sink that absorbs some of the heat of the reaction, thereby reducing peak flame temperature and the resultant rate of NOx formation. The water injected into the engine is required to be extremely pure or the engine will require significant amounts of maintenance and repair. The manufacturer of Cominco's large diesel-fired engines, usually installs Direct Water Injection on engines with Low NOx modification packages. The Low NOx modification package is described below. Cominco has verified that a reverse osmosis water treatment and injection system would be necessary for this technology to be considered. A NOx reduction of 40% to 60% may be expected with this combined technology. Wartsila expects NOx emissions of approximately 6 grams per KW - hour with DWI controls installed on the 5000 kW generators. The manufacturer expects no additional fuel consumption when retrofitting the 5000 kW generators with both DWI and Low NOx Modification. If only DWI was retrofit, a 3% increase in fuel consumption is anticipated.

DRY CONTROLS

Dry controls incorporate an efficient combustion chamber design, staged combustion, and/or use of a lean fuel-to-air ratio. The use of lean fuel-to-air ratio results in lowered average combustion temperatures, reducing the formation of thermal NOx. Thermal NOx formation tends to be maximum at the high temperatures associated with stoichiometric conditions. Combustion chamber design changes may also reduce peak temperatures, thus limiting thermal NOx formation. The design techniques for this "dry low NOx" (DLN) combustion technology include staged combustion and/or use of a lean pre-mix combustion configuration. Specific examples are provided below.

Low NOx Modification

For the main generators, Wartsila has developed a retrofit package called a Low NOx Modification. This modification is based on a higher combustion air temperature at initiation of the injection cycle, which drastically reduces the ignition delay. The retrofit also retards the fuel injection start and has a shorter injection period that makes combustion take place at the optimal point with respect to efficiency. It improves fuel atomization, and modifies combustion space for improved mixing of air and fuel. The design requires replacement of the piston crowns, piston ring set, fuel injection valve, cylinder head, cylinder liner, and antipolishing ring. The Low NOx modification is expected to reduce NOx emissions approximately 30% from the Wartsila engines. The low NOx modification incorporates fuel injection timing retard as described below.

Fuel Injection Timing Retard

Fuel Injection Timing Retard (FITR) reduces NOx emissions in reciprocating engines by delaying the injection of fuel in the engine from when the chamber is at its smallest, to a time when the compression chamber is expanding. The larger

volume in the compression chamber produces a lower peak flame temperature, thus reducing thermal NOx formation.

FITR reduces the fuel efficiency of engines leading to a potential increase in SO_2 emissions. The extent of FITR is also limited because excessive injection delay can cause the engine to misfire. Emission reductions can range between 20% to 30% depending on the degree of FITR implemented.

Lean Pre-mix

Lean pre-mixed combustion technology can be used for heaters, boilers, and turbines. The air and fuel are pre-mixed before introduction into the combustion zone. This results in a mixture with a very lean and uniform air-to-fuel ratio. The lean fuel-to-air ratio results in lowered average combustion temperatures, reducing the formation of thermal NOx. The homogeneous mixture prevents formation of localized fuel-rich pockets within the combustion zone, which further reduces peak temperatures and lowers thermal NOx formation. To stabilize the flame and to assure complete combustion with minimum carbon monoxide emissions, a pilot flame may be incorporated in the combustor or burner design.

Lean pre-mixed combustors are not an effective control technique at reduced load conditions, because as the fuel requirement is decreased, the air and fuel mixture becomes too lean for proper combustion. To avoid these conditions, manufacturers' lean pre-mixed combustors switch to a conventional combustion mode at reduced-load conditions, which result in higher NOx emissions.

Staged Fuel

Staged fuel burner technology for heaters, boilers, and turbines, consists of two combustion zones. In the primary zone, a portion of the fuel is introduced to the combustion chamber with a fraction of the fuel characterized as a fuel-lean burn. The excess combustion air acts as a heat sink and results in sub-stoichiometric combustion conditions. The

remainder of the fuel is injected in the secondary zone and combusted. The technology reduces thermal NOx.

Overfire Air

Off-stoichiometric combustion, for heaters and boilers, includes the following control technologies: using of secondary air, burners-out-of-service, and biased burner firing.

The Overfire Air (OFA) technique generally is not available for boilers with capacities less than 25 MMBtu/hr. OFA is applicable only to boilers with special burner design.

Regarding the NOx removal efficiency of OFA, performance test data reported by EPA for three small gas-fired boilers, ranging in size from 22 to 56 MMBtu/hr, showed that controlled levels in the range of 0.073 to 0.142 lb/MMBtu were achieved, with emission reductions of 13% to 73% reported. Data for a 22 MMBtu/hr boiler burning distillate oil showed that emissions were reduced from an uncontrolled level of 0.154 lb/MMBtu to a controlled level of 0.125 lb/MMBtu, an emission reduction of 19 percent.

Flue Gas Recirculation (FGR)

Flue gas or exhaust gas recirculation is a proven control strategy for boilers and heaters. The basic principal of flue gas recirculation (FGR) is to replace a portion of the incoming combustion air with exhaust gas. FGR reduces NOx formation by reducing available oxygen content and by acting as a heat sink to lower peak combustion temperatures. At full-load, this results in a richer burn with more exhaust gas to absorb the heat of combustion, resulting in a lower combustion temperature. NOx removal of up to 40% is achievable by using a maximum recirculation of 30% exhaust gas. FGR with LNB can reduce NOx emissions up to 71%. FGR systems are commercially available, and are therefore technically feasible.

Recently, a new class of ultra-low NOx burners has been developed, which use a combination of techniques. The

burners are designed to recirculate hot oxygen-depleted gases into the combustion zone, thereby maintaining optimum flame temperature, yet reducing NOx by excess air controls.

Staged Combustion Air (SCA)

Another low NOx technology for boilers and heaters is a rich/quench/lean staged combustion design. Air and fuel are injected directly in the combustion zone to mix and combust simultaneously. The off-stoichiometric or staged combustion air method separates the combustion process into two stages: primary and secondary combustion. Primary combustion is the first stage of combustion conducted in a fuel-rich combustion zone. Combustion is then completed at lower temperatures in a secondary, fuel-lean zone.

The fuel-rich first stage inhibits the formation of thermal NOx due to low oxygen levels. Second stage combustion temperatures are below NOx formation temperatures due to the injection of excess air. This design controls both thermal and fuel NOx. Low NOx burners (LNB) achieve reductions in NOx emissions by using multiple combustion stages with varying fuel-air ratios to reduce combustion temperatures and thermal NOx formation.

Good Combustion Practice

Good combustion practice is applicable for all combustion sources. This method requires operating *and* maintaining the equipment according to the manufacturer's recommendations, operator experience, and good arctic engineering practices to obtain maximum fuel efficiency and minimum emissions.

4.1.3 NOx Control for Wartsila Generator Five and Seventeen (MG-5, MG-17)

Cominco plans to operate seven 5000 kW Wartsila generator sets (MG-1 through MG-6, and MG-17). Two of these units (MG-5 and MG-17) are subject to BACT review. Wartsila engines MG-1 through MG-5 are existing 5000 kW units that

the Department permitted under PSD in 1988 with operational restrictions. Two of the five units were to operate in standby status. Cominco's application and permit did not identify the standby units. Therefore, the Department has interpreted that at least two of the five units must be in standby at any given time in order to comport with the 1988 permit decision.

In 1994, the Department issued a PSD permit to remove standby status from one of the existing units (unit MG-2). An operational cap of 109,660,000 kW-hr per year was imposed on the remaining four units--MG-1, MG-3, MG-4, and MG-5, which was equivalent to full-time operation of three units, with one unit on standby. Under the kW-hr operational cap, all four engines could operate simultaneously provided the annual kW-hr limit was not exceeded. Cominco also added a sixth 5000 kW Wartsila engine to operate full time as part of the 1994 permit.

Cominco is currently requesting the removal of the annual kW-hr operational restriction. Cominco has requested that MG-5 represent the standby unit for the purpose of BACT analysis. Therefore, MG-5 must undergo a BACT analysis as a modified source. Cominco is proposing to add a seventh 5000 kW Wartsila engine which, therefore, must undergo BACT analysis as a new emission source.

The control technologies Cominco evaluated as possible BACT technologies for MG-5 and MG-17 are Direct Water Injection (DWI)/Low NOx Modification, Fuel Injection Timing Retard (FITR), Low NOx Modification, Selective Catalytic Reduction (SCR), and Non-Selective Catalytic Reduction (NSCR). Because NSCR requires low oxygen content in the exhaust gas stream, it was the only control technology considered unavailable for diesel units due to technical constraints. Of the remaining technologies, Selective Catalytic Reduction with an estimated reduction of 90% is the most stringent. Top Down BACT analysis requires the consideration of the most stringent control technologies first.

If the most stringent control technology is considered BACT, then no analysis of less stringent controls is required.

Selective Catalytic Reduction

Selective Catalytic Reduction (SCR) is the most stringent control technology available for large diesel-fired generators. Top-Down BACT requires the Department to consider the most stringent technology before looking into less effective control technologies. The results of the Department's Technical and Economic analysis are presented below. The Department based the analysis on information provided by Cominco, SCR vendors, and SCR operators.

Technical Feasibility

SCR is a technically-feasible control technology for diesel internal combustion engines. The Department believes that, although SCR has not been implemented in Alaska, it is a technically-feasible technology for Alaska. SCR manufacturers, including Siemans are willing to offer SCR packages for diesel engines with warranties of up to 90% NOx reduction. For many years, the Department eliminated SCR as BACT, partly due to the safety concerns regarding the use and transportation of anhydrous ammonia to rural areas. However, recent innovations in SCR technology primarily alleviate the safety concerns regarding ammonia use.

Ammonia can now be generated safely from urea on demand. Without urea-based ammonia generation, Cominco would have to store large quantities of anhydrous aqueous ammonia on-site (185,000 gallons at the port, 7,125 gallons at the mine) due to the mine's remote location and short shipping season. With the storage of large quantities of ammonia, Cominco expressed concerns regarding the difficulty of evacuating mine personnel. However, with ammonia generated from urea, no ammonia storage is required at the port, and the mine-site ammonia requirement is reduced to one 2,000-gallon day tank and one 750-gallon mixing tank. Release of this small amount of aqueous ammonia at the

mine-site is unlikely to require evacuation of the entire facility. Urea-based ammonia generated on demand eliminates the ammonia safety concerns at the port and greatly reduces the risk at the mine-site.

Residual ammonia in exhaust does react with sulfuric and hydrochloric acid to produce ammonium salts. These salts can potentially be generated at explosive levels in the exhaust gas. However, current catalysts and sophisticated ammonia control systems effectively eliminate this risk. A more valid concern is ammonia slip where the SCR unit releases ammonia into the atmosphere due to the incomplete reaction of injected ammonia. Ammonia slip should be minimized using the vendor's proposed control systems. Cominco's vendor, Siemans, guarantees ammonia slip of less than 10 ppm at 15% O_2 in the exhaust gas. The OSHA Permissible Exposure Limit is 50 ppm (TWA), the ACGIH Threshold Limit Value is 25 ppm (TWA), and 35 ppm (STEL). The expected 10 ppm of ammonia slip will diffuse to significantly lower concentrations before the exhaust plume reaches the ground. Ammonia slip while not an immediate health concern, does introduce a new pollutant into the atmosphere. However, during the course of a year, operating two 5 MW engines full-time with SCR controls would result in approximately 5 tons of ammonia slip while removing over 1400 tons of NOx, when compared with uncontrolled NOx emission rates.

Economic Feasibility

With technical and safety concerns addressed, the primary issue is the economic viability of SCR at the mine's location. The Department asked for the economic analysis of SCR using both aqueous ammonia and urea. Cominco provided four cost scenarios for SCR. Each scenario included amortization over 10 years, 5 years, and 3 years. The Department generally considers an amortization period of 10 years as appropriate for a BACT analysis. Cominco provided the 5-year and 3-year amortization periods because they believe

natural gas reserves may be developed near the mine and the engines retrofitted for gas use within this time frame. However, without a firm commitment from Cominco to switch to natural gas, the Department selected an amortization period of 10 years. The scenarios provided by Cominco are discussed further below.

A crucial part of Cominco's economic analysis is consideration of the Waste Heat Recovery Unit (WHRU) that currently extracts waste heat from MG-5's exhaust gases. To install SCR, Cominco can either relocate the WHRU to another engine, or purchase a supplemental boiler to supply heat lost due to eliminating the WHRU. One of the scenarios provided by Cominco included both the costs of the supplemental boiler and the WHRU relocation as an estimate of lost future waste-heat recovery capacity. We believe that including both costs is inappropriate. Additional waste heat recovery needs are outside the scope of Cominco's production rate increase project as described in the current application.

Of the three remaining scenarios, two evaluate the costs for aqueous ammonia-based SCR in conjunction with relocating the WHRU and purchasing the supplemental boiler. The third scenario evaluates the cost of urea-based SCR in conjunction with purchasing the supplemental boiler. Cominco did not provide an economic evaluation of urea-based SCR with the WHRU relocated to another engine. For a prior project in 1993 (Cominco, 1993), Cominco provided an economic analysis of urea-based SCR but, this analysis does not take into account the WHRU relocation scenario. ADEC reused Cominco's current analysis to estimate the cost of urea-based SCR under the WHRU relocation scenario. The table below shows the cost per ton of pollutant removed for the three scenarios Cominco provided, the 1993 Cominco urea SCR cost estimate, and the ADEC estimation of urea-based SCR with the WHRU relocated.

Table 4.1.3 – 1. Selective Catalytic Reduction Cost Effectiveness

Origin	Reagent	Scenario	Cost/ton NOx Removed
Cominco 1998	aqueous ammonia	Supplemental Boiler	$5,643
Cominco 1999	aqueous ammonia	WHRU relocated	$3,743
Cominco 1999	urea	Supplemental Boiler	$4,072
Cominco 1993	urea	not addressed	$2,902
ADEC	urea	WHRU relocated	$2,279
ADEC	urea	WHRU relocated	$1,586

The $2,279/ton NOx removed cost is based directly on data Cominco provided, and uses the same assumptions. The $1,536/ton NOx removed cost is largely based on Cominco's data and assumptions. However, ADEC modified Cominco's methods to account for a more precise estimate of remote location costs and, per EPA guidance, a reduced annual cost of capital. Piping and electrical costs were lowered to reflect guidance from the EPA's *OAQPS Control Cost Manual*, EPA 450/3-90-066 (EPA 1990). ADEC lowered the cost of water pretreatment based on water use estimates provided by Cominco's SCR vendor and conversations with the water-treatment-system vendor. The $1,586/ton cost also reflects the higher cost of using more urea, since it appears that Cominco underestimated the mass of urea required for SCR. The details of ADEC's analysis are found in Appendix A.

The $2,902/ton NOx removed was included in Cominco's prior permit application of 1993, requesting the installation of the same make and model of engine. ADEC included the

1993 cost to provide a comparison with Cominco's current estimates and the Departments estimates.

ADEC considers all of the costs shown on the above table to be economically feasible. Additionally, the costs presented are within the range considered feasible by the U.S. Environmental Protection Agency (EPA) stated in their January 26, 1999 letter to ADEC (EPA 1999).

The technical reservations and safety issues concerning SCR are reduced by the use of modern catalysts and urea-based reagent. Of the available control technologies, SCR is the most stringent control, providing 90% reduction of NOx. The costs are well within what ADEC and EPA considers economically feasible.

BACT decision for Wartsila Generator Five (MG-5) and Seventeen (MG-17)

Cominco differs with ADEC that SCR is technically- and economically-feasible. Cominco maintains that SCR is unproven in an arctic environment, has safety issues associated with ammonia use, is too expensive and, therefore, should not be considered as BACT.

Because of this fundamental difference, Cominco has proposed an alternative that provides a NOx reduction similar to SCR and provides other advantages attractive to both Cominco and ADEC. Cominco proposed that the Wartsila Low NOx Modification package be BACT for the two engines under consideration. Cominco also proposes to install Low NOx controls on the three uncontrolled engines (MG-1, 3, 4) and installing Low NOx controls on the two engines with FITR as controls (MG-2 and MG-6). Wartsila estimates emission reductions of 30-35% from a conventionally configured unit. Wartsila estimates an additional 10% to 15% NOx reduction on the engines with FITR currently installed.

Installing Low NOx on all seven engines has several advantages over installing SCR on two engines. The capital and operating costs of Low NOx are lower than SCR. The table below compares the capital costs, annualized costs, and the cost per ton of NOx removed for Low NOx and SCR.

Table 4.1.3 – 2 Cost of Controls for a Single 5000 kW Wartsila

	Total Installed Capital Costs ($)	Total Annualized Costs ($/year)	Tons NOx Removed (tons)	Cost effectiveness ($/year)
Low NOx	$370,738	$89,754	237.4	$378
SCR	$3,629,257	$1,128,885	712	$1,586

Table 4.1.3 – 3 Large Diesel Engine NOx Controls Comparison

Operational Assumption	Control Technology	Tons NOx Removed (tons/yr)	Potential NOx Emissions after controls (tons/yr)
Operating Scenario A Seven engines continuous operation	Low NOx (seven engines)	1,662	3,878
	SCR (two engines)+ FITR (two engines)+ +three engines uncontrolled	1,741	3,799
Operating Scenario B 6 engines continuous operation, 1 engine on standby[1]	Low NOx (seven engines)	1,425	3,324
	SCR (two engines)+ FITR (two engines)+ +three engines uncontrolled	1,029[1]	3,720

[1] Potential emissions based on one SCR controlled engine on standby status.

The use of Low NOx controls also eliminates the logistical problems (such as shipping urea to the site) associated with operating SCR at the mine.

For full-time, 100% load operation, applying Low NOx controls to seven engines would result in 1,662 tons NOx removed per year. Similarly, for full time, 100% load operation, applying SCR to the two engines subject to BACT

would result in 1,741 tons NOx removed per year. Assuming full-time, 100% load operation, there is less than a 5% difference in NO_x removal between the SCR and Low NOx scenarios. The incremental cost of SCR controls to remove the additional 79 tons of NOx is $29,759 per ton of NOx removed. The high incremental cost for SCR compared with Cominco's proposal for Dry Low NOx controls on seven engines is exorbitant.

If all the generators were run full-time the installation of Low NOx on all seven generators would result in 79 tons per year more NOx emissions than the installation of SCR on the two generators that require BACT. In a practical sense, all seven engines will not be operating continuously or at full-load. A reasonable assumption is that under typical operating conditions one or more engines will not be running due to maintenance of standby-generation capacity. The higher operating cost of SCR in comparison with an uncontrolled generator provides an economic incentive for Cominco to reduce the operating time of the SCR unit. Following this reasoning, Cominco may choose one of the two units fitted with SCR as the standby unit in order to reduce operating costs. If an SCR controlled unit is in standby throughout the year, then the SCR scenario could emit up to 396 more tons of NOx per year than the Low NOx control scenario for all seven units. Installing Low NOx controls on all seven generators provides a greater consistency of control than installing SCR on just two engines. Therefore, this option could result in a greater emission reduction.

Cominco has proposed a proactive approach for a cost-effective NOx emission control strategy by installing Low NOx controls on five existing engines not subject to BACT review for this project. Because Cominco's proposal:

- achieves a similar maximum NOx reduction as the most stringent controls;
- can potentially result in a greater NOx reduction; and

- is logistically and economically less onerous to Cominco.

The Department finds Low NOx controls to be BACT on diesel generators MG-5 and MG-17. A vendor guaranteed emission rate of 11 grams per kilowatt hour is representative of the NOx reduction expected of the Low NOx controls selected as BACT. Condition XI(A) requires units MG-5 and MG-17 to meet an emission rate limit of 11 grams per kilowatt hour representative of BACT. Condition VI(B) requires source testing within 90 days upon start-up and every 5 years to demonstrate compliance with the BACT requirement. Condition XI(C) requires reporting the source test results. Condition VI(A) requires the installation of Low NOx controls on units MG-1, MG-2, MG-3, MG-4, and MG-6.

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

AIR QUALITY CONSTRUCTION PERMIT

Permit No. 9932-AC005 Date: Preliminary—May 4, 1999

The Department of Environmental Conservation, under the authority of AS 46.03, AS 46.14, 6 AAC 50, 18 AAC 15, and 18 AAC 50, issues this Air Quality Control Construction Permit to:

Owner and Operator: **Cominco Alaska, Incorporated**
P.O. Box 1230
Kotzebue, AK 99752

Permittee: **Cominco Alaska, Incorporated**

Facility: **Red Dog Mine**

Location: **145 km north of Kotzebue, Alaska**
UTM Coordinates Northing 7551 km, Easting 590 km
Zone 3

This permit authorizes the Permittee to modify the Red Dog Mine Facility:

- operate a new diesel-fired generator,
- remove operating restrictions on four diesel-fired generators,
- restore original operating restrictions on three other generator sets,
- add a diesel generator set,
- add a new incinerator and remove an old incinerator,
- add 12 new heaters,

- add an additional diesel storage tank,
- add a new crusher and baghouse,
- increase operating hours for the Assay Lab baghouse,
- increase fugitive emissions, and
- increase the holding capacity of the ore stockpile to support a production rate increase at the Red Dog mining facility.

This permit revises conditions of Air Quality Control Permit No. 9332-AA003 and expands the list of permitted equipment to include unlisted existing sources. This permit also authorizes the Permittee to operate the sources referenced above as provided by AS 46.14.120.

Jim Baumgartner,
Supervisor, Construction
Permits
Air Quality Maintenance Section

Date

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I. Permit Continuity

A. Except as revised or rescinded herein, or as superseded by an Air Quality Permit issued under AS 46.14.170, the Permittee shall comply with terms and conditions of Air Quality Control Permit to Operate No. 9331-AA003, as revised December 4, 1996. If permit terms and conditions listed in this permit conflict with those of Permit No. 9331-AA003, the Permittee shall comply with terms and conditions listed herein.

B. Permit Condition 10 and kW-hour operating limits for units MG-1 and MG-3 through MG-5 listed in Exhibit A of Permit No. 9332-AA003 are rescinded the effective date of this permit action.

* * *

IV. Notification and Operating Conditions

A. The Permittee is authorized to install and operate emission sources at the Red Dog Mine facility as listed in Exhibit A.

B. Re-cam and rebuild each of Wartsila sources MG-1 and MG-3 through MG-5 with low emission retrofit parts before installation of source MG-17. Rebuild each of Wartsila sources MG-2 and MG-6 with low emission retrofit parts before installation of MG-17.

1. Adjust the fuel injection timing of each rebuilt unit to comply with emission limits set out in Condition VI(A)(4).

2. For each unit, provide a notice within 30 days after each unit has been rebuilt and adjusted to document the date rebuild was completed, initial engine start-up after rebuild, degree of fuel-injection timing retard adjustment, and attach a copy of the vendor service representative's trip report.

3. No less than once each calendar year, check and attach to the Facility Operating Report required by Condition 26 of Permit No. 9332-AA003, written verification of the fuel-injection timing retard setting for each engine. List the date of inspection, the service representative's name and credentials, and a copy of the representative's trip report.

* * *

VI. Owner Requested Limits

A. Limit:

1. Effective the issue date of this permit until each unit has been rebuilt using low emission retrofit parts, electric power production of each Wartsila Generator set MG-1 and M-3 through MG-5 should be no greater than 27,415,000 kW-hr per unit during any consecutive twelve-month period;

2. Carbon monoxide emissions from each Wartsila generation set, sources MG-1 through MG-6 and MG-17 to no greater than 8.0 lb/hour;

3. Particulate matter emissions from each Wartsila generation set, sources MG-1 through MG-6 and MG-17 to no greater than 2.6 lb/hour;

4. Oxides of nitrogen emissions from each Wartsila generation set sources MG-1 and MG-3 through MG-5 after engine re-cam and installation of low emission retrofit parts to no greater than 121.6 lb/hour and 11 gram per

kilowatt-hour, expressed as NO_2. Oxides of nitrogen emissions from sources MG-2 and MG-6 after installation of low emission retro-fit parts to no greater than 121.6 lb/hour and 11 gram per kilowatt-hour, expressed as NO_2;

* * *

XI. 18 AAC 50.315 (e) (3) (A): (BACT)

Install emission or operational controls as BACT for the following equipment:

A. Limits

1. Oxides of Nitrogen (NOx) BACT

a) Install and operate as BACT for the following fuel burning equipment at the Red Dog Mine/Mill Complex:

(1) Wartsila Generator Set Units MG-5 and MG-17 with low emission engine configuration;

* * *

b) Comply with the following NOx emission limits. Emissions from:

(1) MG-5 and MG-17 shall not exceed 11 gram/kw-hour and 121.3 lb/hour, expressed as NO_2.

* * *

B. Monitoring and Record keeping

1. NOx

a) For Units MG-5 and MG-17, maintain records of engine configuration changes and

fuel injection timing retard settings as set out in Condition IV(B).

* * *

c) For Units MG-5 and MG-17, conduct periodic NOx emission source tests as set out in Condition III(D) and VI(B)(2).

* * *

C. Reporting

1. NOx

a) Report rebuild and fuel injection timing requirements of MG-5 and MG-17 as set out in Condition IV(B)(2) and (3).

b) Report results of emission performance tests of Units MG-5, MG-17, and MH-1 through MH-3 as set out in Condition III(C).

* * *

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

JUL 29 1999

Reply To
Attn Of: OAQ-107

Mr. Tom Chapple
Alaska Department of Environmental Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska 99801-1795

Re: Cominco Alaska Inc. PSD Permit Issuance

Dear Mr. Chapple:

I enjoyed our telephone conversation on Tuesday, July 27, 1999, regarding Cominco's Red Dog Mine PSD Permit. It is always good to hear a cooperative response when we have complex issues at hand. As promised during the call, I am including in this letter EPA's concerns about the proposed permit.

As we discussed, EPA has two major concerns with the proposed permit:

1. ADEC appears to agree that GM-5 and GM-17 are subject to PSD and must employ Best Available Control Technology (BACT). Although ADEC states in its analysis that selective catalytic reduction (SCR), the most stringent level of control, is economically and technologically feasible, ADEC did not propose to require SCR. Instead, ADEC concluded that installation of low NOx burners on all seven generators and fuel injection timing retard (FITR)

on some of the generators constituted BACT. EPA disagrees with this conclusion and believes that SCR is BACT for GM-5 and GM-17. As we discussed, once it is determined that an emission unit is subject to BACT, the PSD program does not allow the imposition of a limit that is less stringent than BACT even if equivalent emission reductions are obtained by imposing new controls on other emission units.

2. In its PSD analysis, ADEC failed to consider whether GM-1 and GM-3 through 5 are also subject to PSD and thus to BACT. Based on the existing information, EPA believes these emission units are subject to PSD because they are part of the overall project to increase the capacity of the facility through the removal of the existing restriction on operation of these units (the kilowatt per year restriction).

The National Park Service also raised these issues during the public comment period on the proposed permit.

I am pleased that ADEC is continuing to review information on past PSD permitting actions for the Cominco facility. I also appreciate your commitment to discuss your conclusions with my staff before issuing the permit, which you expect to occur in the next week to ten days. I am confident that we will be able to conclude this project by issuance of a solid PSD permit.

Once you have completed your reconsideration of the PSD issues for the diesel generators, please have your staff contact Doug Hardesty at EPA at (206) 553-6441 to discuss your intended response to EPA's concerns. Please also feel free to call me at (206) 553-2963 if I can be of any further assistance in this matter.

Sincerely,

/s/
Anita Frankel, Director
Office of Air Quality

cc: John Notar, NPS

State of Alaska
Department of Environmental Conservation
Division of Air & Water Quality
Air Quality Maintenance Section

MEMORANDUM

TO: Jim Baumgartner, Supervisor
Construction Permits

THRU:

FROM: Brian Renninger, Envir. Engin. Asst.
Air Permits Program

DATE: August 10, 1999

FILE: X00065 (Cominco PRI)

TELEPHONE NO: 465-5100; FAX: 465-5129

SUBJECT: Cominco NOx BACT

RE: Response to BACT section of Appendix A of Cominco's *Comments on Preliminary Technical Analysis Report for Air Quality Control Construction Permit No. 9932-AC005*, entitled *Presentation to Alaska Department of Environmental Conservation of Major Discretionary Air Quality Issues Pending Decision at Cominco's Red Dog Mine.*

The attached document is a response to the BACT section of Appendix A of Cominco's *Comments on Preliminary Technical Analysis Report for Air Quality Control Construction Permit No. 9932-AC005* received by the Department on June 7, 1999. Appendix A of Cominco's comments was originally provided to the Department on March 3, 1999 under the title *Presentation to Alaska Department of Environmental Conservation of Major Discretionary Air Quality Issues Pending Decision at Cominco's Red Dog Mine.*

The document is a point-by-point consideration of Cominco's comments. The majority of the document presents Cominco's comments verbatim, but the Department has paraphrased some of Cominco's comments to save space.

In summary, Cominco believes that a Top-Down analysis shows that the Low NOx retrofit package should be BACT for their Wartsilla 5 MW engines. Cominco's argument relies mainly on comparing the Low NOx retrofit package with Selective Catalytic Reduction.

AQM's response shows that while Cominco maintains that a Top-Down analysis is required, the analysis presented by Cominco is not a Top-Down analysis, does not present the lowest cost scenario, and appears to exaggerate the safety and environmental effects of ammonia. Cominco's analysis does not present information showing SCR to be environmentally, technically, and economically infeasible. Cominco has not completely analyzed the most effective available NOx control, as a Top-Down analysis would require. Cominco also has presented a BACT evaluation that appears to be a "Bottom-Up" analysis and in contradiction with current BACT determination processes.

In short, the information contained in the BACT section of Appendix A of Cominco's *Comments on Preliminary Technical Analysis Report for Air Quality Control Construction Permit No. 9932-AC005* is contrary to EPA guidance and accepted Top-Down BACT analysis procedures, and therefore should not be solely relied upon to determine BACT for the Red Dog Production Rate Increase Project.

* * *

SCAQMD determined a $17,000/ton NOx removed as the maximum cost per ton of pollutant removed. All the costs provided for SCR by Cominco are well within the California $17,000/ton limit.

The RBLC contains numerous BACT determinations for SCR on turbines whose costs-of-control fall within the same price range for SCR as Cominco's Wartsila. These include turbines in Pennsylvania, Virginia, New Jersey, California, and Oregon.

Finally, as stated earlier, the January letter from EPA's Raymond Nye states that costs under $10,000/ton should be considered economically feasible as BACT.

Of the examples cited above, none are exactly the same situation as Cominco's, but all have similar application to fuel burning equipment.

VII. *What is BACT for the PRI?*

VII. A. Cominco submits that SCR should be eliminated from consideration for the combination of reasons already noted:

1. *it imposes a major energy penalty in the form of burning a half-million additional gallons/year of diesel fuel;*

The scenario requiring this additional fuel consumption, as stated in response to items IV.B, IV.C, and IV.D, is not the scenario under consideration, nor is it the scenario presented in the preliminary TAR. Relocating the WHRU or installing a new WHRU eliminates this fuel expense and eliminates the additional pollution due to burning extra fuel.

2. *it provides minimal environmental benefits compared with Low NOx and poses a risk, albeit small, of serious injury and death to plant workers; and*

We agree with Cominco that the ammonia risks are small. The urea-based SCR system effectively minimizes the risk due to ammonia transport and handling. Since the majority of SCR operators use either aqueous or anhydrous ammonia in dense population areas, the risk to Cominco by using a urea-based SCR system is proportionately less than that incurred by operators of SCR using anhydrous or aqueous ammonia.

According to EPA guidance quoted in our response to V.A.1., environmental concerns should be used only as justification for requiring more stringent control technology; they should not be used to justify a less stringent technology.

Cominco has not shown that a 10-ppm ammonia stack concentration will cause harm to the environment. Conversely, ADEC staff have modeled ambient ammonia affects to be negligible.

3. *it* [sic] *costs are approximately 5 to 8½ times as much per ton of NOx removed as Low NOx controls.*

This comparison is inappropriate and spurious, and contrary with previously presented cost assessments we have prepared for Low NOx and SCR controls. Top-down BACT requires the most stringent feasible control to be used without comparison to less stringent controls. If it is economically feasible for an applicant to use a more effective control technology, then the more effective control technology should be used. The cost effectiveness of SCR is within what has been found feasible in comparable cases. According to data Cominco has provided to the Department, SCR appears within Cominco's means.

On balance, Cominco submits that the case for SCR cannot be supported. That explains why SCR has never been required for a similar source in similar circumstances in Alaska or elsewhere.

We disagree that the case for SCR cannot be supported. The information provided by Cominco in their application and supplements does support the case for SCR. Barring the upcoming installations at UAF, and Coeur Alaska's Kensington Gold Mine, we agree that SCR has never been applied in Alaska. We dispute that it has never been applied to similar emission sources elsewhere. As discussed in V.B.2, Cominco has provided information to the Department showing that SCR has been installed on similar diesel-fired engines throughout the world.

VII. B. *Figure 9 is a chart which compares, in quantitative terms, the various control options based on energy, environmental, and economic impacts, and uses a quantitative comparison to rank the options. Based on this evaluation, Low NOx is the preferred option.*

The analysis presented in Figure 9 is not a quantitative analysis, but a qualitative analysis and contains serious flaws with regard to BACT. First, operation per design is the base case. Because of operation per design is the base case, it is clearly a form of 'bottom up' BACT analysis which currently is not an accepted method for determining BACT. In addition, many of the ranking categories are redundant, arbitrary, or irrelevant. Moreover, the ranking scale of 1 to 3 appears arbitrary, improperly weighted, and is too small to illustrate the real differences between control technologies. The analysis presented in Figure 9 is clearly contrary to the current practice of BACT analysis and will certainly result in a greater, not less, arbitrary BACT decision than EPA's current 'top down', case-by-case analysis. If Cominco stands by Parts I and II of the BACT section of their presentation, then this analysis is clearly inappropriate if they believe a Top-Down analysis needs to be performed.

In summary, Cominco's arguments are not convincing that ADEC should dismiss SCR as BACT when conducting a Top Down assessment. Cominco has presented an inappropriate Bottom-Up analysis, does not present the lowest cost option of a given technology, and exaggerates the safety and environmental risks from SCR technology.

We maintain that SCR is technically, environmentally, and economically feasible. A top-down analysis should start with the most effective control technology. In this case, the most effective control is the combination of SCR in conjunction with direct water injection/Low NOx retrofit; Cominco has not discussed this possibility in their presentation, but has in their October 1998 supplement to their application. It is clear that SCR (the most effective individual technology) should

be considered technologically, environmentally, and economically feasible for the Red Dog power plant engines.

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Juneau, Alaska

FINAL
TECHNICAL ANALYSIS REPORT
For Air Quality Control Construction Permit No. 9932-AC005

Cominco Alaska, Inc.
Prevention of Significant Deterioration
Red Dog Mine Production Rate Increase

September 1, 1999

Prepared by:
Alaska Department of Environmental Conservation
Air Permits
410 Willoughby Avenue, Suite 105
Juneau, AK 99801-1795

With substantive information by:
Hoefler Consulting
1205 East International Airport Road, Suite 201
Anchorage, AK 99578

* * *

4.1.3 NOx Control for Wartsila Generator Five and Seventeen (MG-5, MG-17)

Cominco plans to operate seven 5000 kW Wartsila generator sets (MG-1 through MG-6, and MG-17) for the Production Rate Increase Project. Two of these units (MG-5 and MG-17) are subject to BACT review. Wartsila engines MG-1 through MG-5 are existing 5000 kW units that the Department permitted under PSD in 1988 with operational restrictions. Two of the five units were to operate in standby status. Cominco's application and permit did not identify the standby units. Therefore, the Department has interpreted that at least two of the five units must be in standby at any given time in order to comport with the 1988 permit decision.

In 1994, the Department issued a PSD permit to remove standby status from one of the existing units (unit MG-2). An operational cap of 109,660,000 kW-hr per year was imposed on the remaining four units--MG-1, MG-3, MG-4, and MG-5, which was equivalent to full-time operation of three units, with one unit on standby. Under the kW-hr operational cap, all four engines could operate simultaneously provided the annual kW-hr limit was not exceeded. Cominco also added a sixth 5000 kW Wartsila engine to operate full time as part of the 1994 permit.

Cominco is currently requesting the removal of the annual kW-hr operational restriction. Cominco has requested that MG-5 represent the standby unit for the purpose of BACT analysis. Therefore, MG-5 must undergo a BACT analysis as a modified source. Cominco is proposing to add a seventh 5000 kW Wartsila engine that, therefore, must undergo BACT analysis as a new emission source.

The control technologies Cominco evaluated as possible BACT technologies for MG-5 and MG-17 are Direct Water Injection (DWI)/Low NOx Modification, Fuel Injection Timing Retard (FITR), Low NOx Modification, Selective

Catalytic Reduction (SCR), and Non-Selective Catalytic Reduction (NSCR). Because NSCR requires low oxygen content in the exhaust gas stream, it was the only control technology considered unavailable for diesel units due to technical constraints. Of the remaining technologies, Selective Catalytic Reduction with an estimated reduction of 90% is the most stringent. Top Down BACT analysis requires the consideration of the most stringent control technologies first. If the most stringent control technology is considered BACT, then no analysis of less stringent controls is required.

Summary of Preliminary Decision and Public Comment

The applicant, Cominco, submitted an application for a construction permit to increase production at the Red Dog Mine. The production rate increase is subject to review under the prevention of significant deterioration (PSD) provisions of the state construction permit regulations, since it will cause significant emission increases in NOx. As a result, the applicant is required to show that BACT for NOx will be installed and used on each new or modified source.

As part of the production increase, the applicant proposed to increase electrical production at the Mine's power plant. In order to do this, the application called for the Department to remove an existing permit limitation that governed the operation of four diesel engines that make-up part of the power plant. This limitation currently restricts the combined operation of these four engines in a manner that would be equivalent to three engines operating full-load for the entire year. Through this permit action, the applicant desires to remove this limitation so the four engines can be operated full-load for the entire year.

In the matter of defining the modification, the applicant proposed that the emissions of three engines be limited according to the original 1988 permit, which allowed the operation of three engines full-load for the entire year. Also, the applicant proposed that the fourth engine, known as MG-5 and considered a standby engine in the 1988 permit,

be considered a modified source in this permit action and be subject to BACT for NOx. The Department concurred with this approach to defining the modification and the engine subject to BACT.

In March 1999, the program found that SCR was BACT on MG-5[1]. In response to this proposed preliminary determination, the applicant proposed an alternate emission reduction strategy to serve as BACT. The applicant also amended the application to include the installation of an additional new engine, known as MG-17. This new engine would also be subject to BACT.

The applicant's proposal consisted of two parts. In this first part, the applicant proposed to retrofit all of the existing, unmodified engines in the power plant with components that would reduce their NOx emissions. In the second part, MG-5 would be retrofitted with the same components and MG-17 would be supplied from the manufacturer with the NOx reducing components already installed. From the information presented, the retrofit appears to be equivalent to the manufacturer's most recent stock configuration of the 16V32 engine.

The Department proposed the alternate BACT in its preliminary decision, and argued that the aggregate emission reduction achieved at the power plant was nearly equivalent to the emission rate that could be achieved with SCR on only MG-5 and MG-17.

During the public comment period, the applicant, and the federal land manager objected to the alternate BACT proposal and the Department's judgement of it as meeting BACT. The applicant felt the Department did not use the appropriate standard of review and, if it had done so, would have rejected all control technologies except for the appli-

[1] March 3, 1999 memo from John M. Stone, ADEC, to Tom Chapple, ADEC.

cant's proposed BACT. The federal land manager also claimed the Department did not use the appropriate standard of review. However, they claimed the Department should have found that catalytic control was BACT.

* * *

NOx BACT Analysis for MG-5 and MG-17

The following presents the Department's final BACT review following the step-by-step top-down approach described previously.

Step 1 – Identify All Control Technologies

The sources under review are Wartsila 16V32 internal combustion, compression ignition, reciprocating engines. The engines burn diesel fuel and power 5,000 KW electric generators.

The applicant identified six control technologies for control of NOx that are applicable to the sources. The technologies are selective catalytic reduction, nonselective catalytic reduction, direct water injection, Low NOx components, Fuel Injection Timing Retard (FITR), Operation per design (no control).

In general, the Department concurs with the applicant's identification of available control technologies.

Step 2 – Eliminate the Technically Infeasible Options

The applicant eliminated from consideration non-selective catalytic reduction as being technically infeasible. In the preliminary decision, the Department concurred with the applicant that non-selective catalytic reduction is technically infeasible. This is because the oxygen content of the exhaust gas of the sources is too high.

The Department reviewed and concurred with this finding.

Step 3 – Rank the Remaining Control Technologies by Control Effectiveness

By reviewing the application and numerous submittals, one can develop a ranking of the remaining control options by control effectiveness. The Department, in its preliminary decision, did not provide a ranking of the control options by control effectiveness. For purposes of the final evaluation, the technologies were grouped into three control options: catalytic reduction, direct water injection, and the manufacturer's stock engine configuration as of a certain date.

A ranking for the MG-5 and MG-17 by control effectiveness, expressed as percent reduction in NOx from the base case and emission in tons per year after application of the control option, is shown below. The base case of the new engine, MG-17, is the 1999 stock engine. The base case of the modified engine, MG-5, is its current 1988 configuration.

Control Option	Emission Rate (TPY)		Per Cent Reduction	
	MG-17	MG-5	MG-17	MG-5
Catalytic Controls	53	90	90	90
Direct Water Injection	266	451	50	50
1999 Stock Engine	531	531	0	41
1988 Stock Engine	N/A	902	N/A	0

The applicant provided detailed discussion of the economic, environmental, and energy impacts of each control option in the application and numerous addenda.

Step 4 – Evaluate the Most Effective Controls and Document Results

In the application and comments on the Department's preliminary decision, the applicant argued that catalytic controls and direct water injection were not achievable at the Red Dog Mine for energy, environmental, and economic reasons. They concluded that an emission limit that could be achieved with a 1999 stock Wartsila engine should be BACT. To meet BACT for MG-5, they proposed to retrofit it to the 1999 configuration.

In its preliminary decision, the Department argued that an emission rate roughly equivalent to that which could be achieved with catalytic control was BACT. The Department indicated the emission limit could be met by retrofitting all of the engines in the power plant to the 1999 engine configuration. In this way, the Department tempered the stringency of BACT by crediting the applicant with emission reductions from sources that were not part of the permit action. Also, the Department did not reject catalytic controls or direct water injection as BACT due to energy, environmental, or economic considerations.

The applicant, EPA, and the Federal Land Manager criticized the Department's preliminary decision. These parties took exception to the Department's approach in tempering the stringency of BACT by crediting the applicant with emission reductions at existing, unmodified sources. The land manager and the applicant also criticized the Department for not following the top-down approach, in that the Department did not determine that catalytic controls or direct water injection were not achievable at the Red Dog Mine.

The collateral impact clause of the BACT definition allows permitting authorities to temper the stringency of BACT in cases where the energy, environmental, or economic impacts that are associated with the use of a control option at a specific facility are viewed by the review agency as sufficiently adverse as to render the use of that technology inappropriate for a given facility. In this case, the emission reductions achieved by the applicant's proposal to retrofit the

existing, unmodified engines into a 1999 configuration is not a consideration of the BACT review provided for by the applicable law or guidelines. Therefore, it cannot be used to temper the stringency of BACT.

* * *

Economic Impacts

In the preliminary decision, the Department recalculated and presented the costs associated with the catalytic control option. The Department did this because the applicant's cost estimates used inappropriate adjustments and appeared to double-count ~~ed~~ some costs. As presented, the applicant's costs appeared to be out of line with cost estimates available to the Department from other sources.

The applicant commented that the Department's economic analysis was flawed. The applicant ~~believed~~ asserted the Department did not appropriately account for all of the valid costs associated with the loss of heat recovery on MG-5.

The applicant looked at two options to replace the lost heat from the recovery unit on MG-5. One option was to install a supplemental boiler. The other was to install a heat recovery unit on an engine that is not currently outfitted with a heat recovery unit. Although the latter option is significantly cheaper, the applicant ~~does not~~indicated they do not prefer it because a future option to reclaim heat would be lost.

The applicant also asserted that the entire powerhouse and mill must be shut down in order to remove the heat recovery unit from MG-5 and install a new heat recovery unit on another engine. The applicant argued that the costs associated with the mill shutdown should be included in the catalytic control option.

To address the applicant's concerns, the Department adjusted the cost of catalytic controls for MG-5 by including the costs of removing the heat exchanger from MG-5 and installing a new heat exchanger on an engine that is not currently

equipped with waste heat recovery. The Department chose this option over the supplemental heat boiler because the Department anticipates the applicant would use the most cost-effective option if required to install catalytic controls. Although less costly, the applicant has asserted that this option would eliminate the potential for future waste heat recovery.

With respect to the mill shutdown costs, the Department was not persuaded by the evidence provided that the entire mill must be shut down in order to install a new heat recovery unit. Therefore, the costs associated with the mill shutdown were not taken into account in the catalytic control option for MG-5.

With the above adjustments, the Department's estimate for the costs of catalytic controls are presented in summary form below.

The capital cost to install catalytic controls on the new unit, MG-17, is estimated at $2.9 million, with an annual operating cost of $635,000. This translates to a cost-effectiveness of $2,100 per ton of NOx removed.

The capital cost to install catalytic controls on the modified unit, MG-5, is estimated at $3.6 million, with an annual operating cost of $760,000. This translates to a cost-effectiveness of $2,360 per ton of NOx removed. This cost includes the removal of the heat recovery unit and the installation of a new heat recovery unit on another engine.

As stated above, the applicant predicted the cost-effectiveness of SCR at approximately $5,600 per ton of NOx removed.[3] The applicant's cost estimate appears to be overstated.

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[3] Table A, Appendix A, February 1999 response to January 28, 1999 ADEC request for more information for Red Dog Mine, Hoefler Consulting Group.

Despite the differences over cost, the applicant believes the Department should reject catalytic controls due to economic considerations. In the applicant's words the "costs are very significant, affecting Cominco's cost of production and competitiveness in world markets."

The applicant cites several instances where the top-down approach allows permitting authorities to reject a control option for cost considerations.

The first is when an applicant demonstrates, to the satisfaction of the permitting agency, that the costs of pollutant removal for the control alternative are disproportionately high compared to the cost of control in recent permit determinations.

The second is when the cost-effectiveness of a control option is outside the range of costs being borne by similar sources under recent BACT determinations.

The third is when an applicant can demonstrate that the cost of the control option will cause adverse economic impacts to the facility.

The applicant provided a print-out from EPA's RACT/BACT/LAER Clearinghouse database (RBLC) to show that catalytic controls have not been imposed on any similar sources in recent permit determinations. Furthermore, they state that catalytic control has been rejected in the most recent determination in California.

Surveying the RBLC has value; since, in theory, permitting authorities are required to input BACT determinations into the RBLC. However, it would be imprudent to rely completely upon the RBLC, since permitting authorities are recalcitrant in their responsibility of inputting BACT data.

In order to address the applicant's concerns, the Department staff obtained as much information as possible about costs of BACT for similar sources throughout the country. Staff also

reviewed the information to see if there is a cost that is considered excessive for BACT.

Every BACT determination for a diesel-fired engine that is listed in the RBLC was reviewed by ADEC. The complete printout is available upon request.

There are no recent BACT determinations for diesel engines used as primary power generation in the RBLC. Moreover, there appear to be only 10 BACT determinations on diesel engines used for primary power generation since 1982. Of these, only one required catalytic controls. Cost data is available for two of the BACT determinations. The cost for both of these 1996 decisions was $432 per ton of NOx removed.

The Department also surveyed the RBLC for recent BACT determinations pertaining to metallic mineral mines. We found one. The facility contained a fuel oil-fired boiler that was required to install BACT at $5000 per ton of NOx removed.

~~We~~The Department reviewed the Department's recent BACT decisions to determine the cost of NOx BACT. costs range from $0 to $7,000 per ton of NOx removed. The four recent BACT determinations for diesel-electric generators used for primary power production range from $0 to $936 per ton of NOx removed. It should be noted that catalytic controls were rejected in two of the decisions because the engines are standby units.

The Department contacted the Air Programs in EPA's Regional Offices to see how much NOx BACT costs in other states, and if there is a cost that is considered excessive for BACT. In general, the Department found there does not appear to be a uniform cost policy that is used throughout the country.

Finally, the Department attempted, but was unable, to determine how much the newer units at electric utilities in the

United States pay for air pollution control per unit of power produced. This inquiry was based on the reasoning that the applicant's powerhouse is similar to an electric utility. If catalytic control costs for this permit action were substantially in excess of the amount that utilities are paying nationally for newer units, then the costs for these catalytic controls could be excessive.

Even without the national data, the Department looked at the cost of catalytic controls per unit of power produced for this permit action. If the Department assumes that both engines run at 80% of full capacity, then approximately 70 million kilowatts of electrical power will be produced each year. The combined annualized cost of catalytic controls for both units is approximately $2.1 million. This translates to a unit cost of 3¢ per kilowatt-hour.

If the applicant did not have a powerhouse, it would probably buy power from a rural Alaska utility. From a cursory review, it appears that the average cost of electricity in rural-Alaska is approximately 15¢ per kilowatt hour. Using this cost, catalytic controls would be equivalent to a 20% increase in the electric rate of the facility. In the Department's judgement, this is a disproportionate cost increase when viewed as an electric utility. Furthermore, the cost is significantly higher on a cost-per-ton removal basis in comparison to the $0 to $936/ton of recent BACT decision for similar installations.

Another perhaps better way to determine if the cost of BACT is excessive, is for the applicant to present detailed financial information showing its effect on the operation. However, the applicant did not present this information. Therefore, no judgment can be made as to the impact of a $2.1 million control cost on the operation, profitability, and competitiveness of the Red Dog Mine.

* * *

BACT decision for Wartsila Generator Five (MG-5) and Seventeen (MG-17)

The Department finds an emission rate achievable with Low NOx controls to be BACT on diesel generators MG-5 and MG-17. A vendor guaranteed emission rate of 121.3 lb/hour is representative of the NOx reduction expected of the Low NOx controls selected as BACT. Section 4, Condition 20 requires units MG-5 and MG-17 to meet an emission rate limit of 121.3 lb/hour representative of BACT. Condition 20 requires source testing within 180 days upon start-up for MG-17 and by March 2000 for MG-5 to demonstrate compliance with the BACT requirement. Condition Section 14, Condition 63 requires reporting the source test results.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

September 15, 1999

Reply To
Attn Of: OAQ-107

VIA FAX

Mr. Tom Chapple
Alaska Department of Environmental Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska 99801-1795

Re: Cominco Alaska Proposed PSD Permit

Dear Mr. Chapple:

This letter is a follow-up to our recent discussions regarding the proposed prevention of significant deterioration (PSD) Permit Number 9932-AC005 for the Cominco Alaska, Inc. (Cominco) Red Dog Mine facility. I appreciate ADEC's willingness to discuss EPA's concerns. However, we have reviewed the September 3, 1999, final draft permit, and it still does not address our concerns. EPA believes the permit still does not meet the PSD requirements of the Clean Air Act. The major deficiencies are summarized below:

1. EPA remains concerned that the PSD analysis conducted by Cominco and accepted by ADEC is inadequate for several reasons. As outlined in my July 29, 1999, letter to you, EPA disagrees with ADEC's determination that the Best Achievable Control Technology (BACT) for Wartsila generators MG-5 and MG-17 is low NOx burners rather than selective catalytic reduction (SCR).

2. The September 3, 1999 draft permit does not require installation of BACT on Wartsila generators MG-1, MG-3, and MG-4, but only proposes to reinstate the annual emission cap on the total emissions from units MG-1, MG-3, and MG-4 (previously, this emissions cap applied to the total emissions from units MG-1 through MG-5). This limit is listed in the September 3, 1999 permit as:

> (1) 2259 tons nitrogen oxides (NOx) per year from units MG-1, MG-3, and MG-4, and
>
> (2) 750 ppm NOx corrected to 7% oxygen from each unit.

Note that while the 750-ppm limit applies upon issuance of the permit, the units are not required to be tested to determine compliance with the limit until 180 days after the engines are rebuilt. This may result in emissions in excess of the 2259-tpy limit prior to rebuilding and testing of the units. Therefore, compliance with the 750-ppm NOx emission limit should be determined upon issuance of the permit. Additionally, the permit conditions allow potential emissions from each generator that are greater than the past actual emissions from each of the generators and result in a significant emission rate increase. Accordingly, it appears that the Wartsila generators MG-1, MG-3 and MG-4 may be subject to PSD, including BACT.

* * *

In summary, the September 3, 1999, draft PSD permit as proposed by the State of Alaska does not meet the PSD requirements of the Clean Air Act or the Alaska SIP requirements relating to the construction or modification of new sources or the modification of existing sources.

EPA is also concerned that ADEC allowed Cominco to commence construction or modifications associated with Cominco's Production Rate Increase project at the Red Dog Mine facility prior to conducting a PSD analysis. Specifi-

cally, EPA believes that the April 2, 1996, ADEC authorization of Cominco's construction and installation of new equipment, including the new gyrator crusher, at the Red Dog Mine prior to Cominco's receipt of a PSD permit, is not in compliance with the Act or the Alaska SIP. In addition, based on a letter from ADEC to Cominco dated May 19, 1998, it appears that Cominco completed construction on the rock crusher described in its PSD permit application prior to the receipt of a PSD permit. It also appears that Cominco may have commenced construction or operation of other equipment or modifications as part of its Production Rate Increase project prior to receipt of a valid PSD permit. If so, these activities constitute a violation of Section 165(a)(1) of the Clean Air Act.

EPA urges ADEC to delay issuance of the PSD permit to Cominco and to conduct a thorough PSD analysis of all the modifications to the facility, including the diesel generators, to address the issues raised in this letter. EPA commits to work with ADEC to promptly address the technical and legal issues related to the Cominco Red Dog Mine PSD permit.

I look forward to speaking with you about these issues during the conference call scheduled for Wednesday September 15, 1999, at 2:00 PM Seattle time.

Sincerely,

/s/
Anita Frankel, Director
Office of Air Quality

cc: John Notar, NPS
John Stone, ADEC

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

SEP 28 1999

Reply To
Attn Of: OAQ-107

Mr. Tom Chapple
Alaska Department of Environmental Conservation
410 Willoughby Avenue; Suite 105
Juneau, Alaska 99801-1795

Re: EPA Review of Cominco Alaska Proposed PSD Permit

Dear Mr. Chapple:

I am sending you this letter as a followup to Chuck Findley's recent discussion with Michelle Brown regarding EPA's concerns with ADEC's proposed prevention of significant deterioration (PSD) Permit Number 9932-AC005 for the Cominco Alaska, Inc. (Cominco) Red Dog Mine facility. As promised, enclosed is the EPA staff review of ADEC's Technical Analysis Report.

Based on the conversation between Ms. Brown and Mr. Findley, I understand that ADEC will not start the 5-day consistency review process on the Cominco PSD permit until after, at the earliest, EPA has the opportunity to discuss the enclosed report with ADEC. Again, EPA urges ADEC to delay issuance of the PSD permit to Cominco until the permit complies with the Clean Air Act and is consistent with the issues raised in this staff review report and in EPA's prior communications with ADEC.

Doug Hardesty, of my staff, will call you on Wednesday to arrange a discussion of the issues raised in the enclosed review. If you have any questions, please feel free to contact Doug at (206) 553-6641.

Sincerely,

/s/
Anita Frankel, Director
Office of Air Quality

CC: J. Stone, ADEC

Enclosure

Review of Technical Analysis Report and PSD Permit for the Production Rate increase at Cominco Alaska, Incorporated's - Red Dog Mine

Region 10 of the Environmental Protection Agency has reviewed the final technical analysis report (TAR) for the draft air quality control construction permit (No. 9932-AAC005) to allow the implementation of the Production Rate Increase project at Cominco Alaska, Inc.'s, lead and zinc mine. The Region asserts that the Alaska Department of Environmental Conservation (ADEC) analysis of the project was inadequate in four main areas resulting in erroneous findings.

(1) The permit does not require installation and operation of the best available control technology for oxides of nitrogen on the 5 MW Wartsila engines (MG-5 and MG-17) used by the facility to produce electricity.

(2) Permit modifications to the NOx emission for units MG-1, MG-3 and MG-4 result in potential emission increases from each of the units without requiring BACT.

(3) Due to modeling analysis deficiencies, the ambient impact assessment indicates that the PM-10 increment (particulate matter with a mean aerodynamic diameter less than 10 microns) may be violated on the existing haul road; and

(4) The permit fails to adequately address other ambient air concerns including establishing a lawful and clear boundary delineating ambient air.

The Region concludes that the PSD permit should not be issued until the project meets the requirements of the Clean Air Act and addresses the concerns listed below.

Best Available Control Technology

Alaska regulations in 18AAC 50.310 (d) requires "a demonstration that the proposed limitation represents the best

available control technology for each air contaminant and for each new or modified source:" Therefore, the Best Available Control Technology (BACT) is required to be installed on each modification which undergoes a significant net emission increase.

BACT is conducted on a case-by-case basis using the top-down approach by ranking all control technologies in descending order of control effectiveness, then eliminating the technically infeasible options. After identifying and listing the available control options, the next step is to determine the energy, environmental and economic impacts of each option. The EPA has concerns primarily with the BACT analysis for the Wartsila engines.

Top-down Analysis

The ADEC did a commendable analysis in determining that selective catalytic reduction (SCR) for the internal combustion Wartsila units is technologically feasible and available. The ADEC states that a carefully designed SCR system can achieve NOx reduction efficiencies as high as 90% with an ammonia slip vendor guarantee of no greater than 10 parts per million (ppm). Region 10 has additional data which support these findings. For example, Wartsila has supplied the EPA with a list of 33 facilities which have installed SCR on more than 50 of their engines worldwide totaling approximately 470 MW of power generation. Installations include numerous facilities in cold climates such as Sweden and Norway as well as remote locations. Domestic installations of SCR on diesel-fired engines include Kauai Electric, Yale University and the Philadelphia Water Department. Conversations with catalyst vendors indicate that this technology has been available since the early 1990's. The DEC also indicated on page 34 of the TAR that no clear evidence has been found that the technology would be problematic in Alaska.

Furthermore, according to EPA's Alternative Control Techniques (ACT) document (EPA-453/R-93-032) for control of

"NOx Emissions from Stationary Reciprocating Internal Combustion Engines," July 1993, several more such installations exist:

"One base-metal catalyst vendor's diesel-fired SCR experience is presented in Table 5-11 and shows six U.S. installations with a total nine engines.... The available data show diesel-fired SCR applications using either zeolite or base-metal catalysts achieve NOx reduction efficiencies of 90+ percent, with ammonia slip levels of 5 to 30 ppmv. These installations include both constant- and variable-load applications." (Attached)

EPA agrees with ADEC's analysis that SCR is technically feasible at Cominco.

Environmental Impacts

Cominco maintained that the storage, use and emission of ammonia would result in unsafe conditions for the workers and adversely impact the environment. ADEC refuted these arguments. ADEC found no basis that ammonia emissions would affect the health-based standards or vegetative impacts. In addition, the accidental release and use of ammonia in catalytic control posed a small risk to workers and visitors. ADEC concluded that they believe ammonia use is safe and routine with proper controls, as demonstrated by an excellent safety record on similar units and turbines. Furthermore, ADEC concluded that NOx emissions reductions resulting from operation of the selective catalytic reduction system would improve workplace conditions. Based on the research of information conducted by ADEC, the state could not find any probable adverse environmental impacts at the Red Dog mine using an ammonia-based or urea-based catalytic control.

Energy Impacts

Cominco raised the issue that installation of SCR on MG-5 would result in having to remove a heat recovery unit from

the stack and install either heat recovery on an existing unit which does not currently have such a device or an entirely separate stand alone boiler for heat generation. These energy concerns were included by ADEC in calculating the cost effectiveness for SCR by accounting for the additional costs of removing the heat recovery from MG-5 and installing it elsewhere.

Economic Impacts

Cost-effectiveness is one of the economic impact analyses which may be considered when determining if a technology represents BACT for a specific application. However, a poor cost effectiveness in and of itself should not be construed as a measure of adverse economic impacts. Cost-effectiveness is generally described as dollars per ton of pollutants reduced. Average cost-effectiveness is determined by calculating the total annualized costs of control divided by annual emission reductions (the difference between the baseline emission rate and the controlled emission rate). To that end, the Region contends that an accurate cost-effectiveness for the SCR option is well within the range of reasonable costs for controlling NOx from the Wartsila engines. Early in the process, the Region informed ADEC that a reasonable cost-effectiveness of controlling NOx emissions from similar sources would be no greater than $10,000 per ton of NOx removed. The capital cost to install SCR on MG-5 and MG-17 was estimated to be $3.6 and $2.9 million, respectively with an annual operating cost of $760,000 and $635,000, respectively. The above noted costs result in a cost effectiveness of approximately $2,360 per ton of NOx removed for MG-5 and $2,100 for MG-17. Although the Region has reason to believe that those cost estimates are higher than would be expected, this analysis will rely on those estimates.

The reasoning behind the higher costs for MG-5 included costs associated with heat recovery. On page B.30 of the New Source Review Workshop Manual, the guidance states

that only direct energy costs associated with the use of the control device (to run the device) should be considered in the analysis. Heat recovery modifications would be an indirect cost and should not have been considered in the cost effectiveness calculation for MG-5. Regardless of the heat recovery costs, the cost-effectiveness is well within the range that the EPA considers reasonable and nothing in the TAR demonstrates to EPA that the cost-effectiveness is unreasonable.

Cost-effectiveness was not calculated in previous BACT determinations in which SCR was required on engines under the top-down BACT analysis because the companies did not argue that the technology should be rejected due to economic considerations. Once a control technology has been determined to be BACT on a particular type of source, i.e. an internal combustion engine, generally, that control technology should be considered economically feasible. Here, Cominco has not adequately demonstrated any site-specific factors to support their claim that the installation of this control technology is economically infeasible at the Red Dog Mine. Therefore, elimination of SCR as BACT based on cost-effectiveness grounds is not supported by the record and is clearly erroneous.

Furthermore, in order to justify economic infeasibility, the Region believes that the economic impact analysis conducted in the draft permit should have gone beyond a review of cost effectiveness to include an analysis of whether requiring Cominco to install and operate the more effective control strategies would have any adverse economic impacts upon Cominco specifically.

The cost effectiveness analysis in the Alternative Control Techniques document (EPA-453/R-93-032) is similar to the one performed by ADEC, finding a cost effectiveness of installing SCR resulting in a 90% NOx reduction on a 5-MW diesel-fired generator which operates approximately 8000

hours per year to be less than $1000 per ton of NOx removed (in 1993 dollars).

Water Injection

The Region is also concerned that the control cost analysis for direct water injection (DWI) was not performed properly by Cominco in its application. However, at this time, EPA does not believe that this deficiency is important since SCR has a higher control effectiveness than DWI. If EPA's determination that SCR is BACT is altered due to new information, EPA should require additional analysis of DWI.

Based on the analysis presented by ADEC, EPA finds no justification for Cominco's conclusion that the cost of SCR is unreasonable compared to the environmental and energy impacts associated with the use of this technology. EPA believes ADEC has made a convincing argument that SCR is technically feasible and cost effective and, therefore, should be BACT.

PSD Applicability to Units MG-1, MG-3 and MG-4

Cominco is requesting that the Wartsila generators (MG-1, MG-3, and MG-4) be placed under the operational cap that used to include MG-1, MG-3, MG-4, and MG-5. ADEC agreed and in removing MG-5 from the cap, required PSD review for only MG-5. Additionally, a seventh similar generator (MG-17) would be added. Thus, under the State's approach only MG-5 and MG-17 are being required by ADEC to install and operate the BACT. Cominco contends that MG-5 previously operated as a standby unit and that under the new configuration MG-1, MG-3, and MG-4 would not increase operation above the operational cap. In EPA's view, however, because the operational cap that used to apply to four units, would now apply to only three units under the cap. The cap is significantly higher than the past actual emissions from each generator. Thus, eliminating the operating limits results in a significant increase of potential emissions from MG-1, MG-3 and MG-4. Cominco should

provide records documenting the prior operation of MG-1, MG-3, and MG-4 so that their past actual operation and emissions can be determined for comparison to the future potential emissions that could occur under the restructured cap. Cominco must show that a cap that formerly covered four generators would not allow additional operation of the three generators that remain under the cap.

While EPA policy would normally not require an emissions unit to be subjected to BACT due to an increase in utilization of existing capacity resulting from modifications elsewhere at the facility, it does require that all emission increases associated with the modifications be counted toward PSD applicability and included in the air quality analyses. In this case, however, full PSD review (including BACT) should apply to MG-1, MG-3, and MG-4 since it is determined that these generators will experience an increase in potential emissions as the result of a restructuring (and potential relaxation) of the operational cap specific to them.

* * *

Conclusion

For all the reasons stated above, the Region concludes that the permit limits for the Wartsila engines for NOx emissions contained in the PSD permit are clearly erroneous and the BACT analysis for MG-1, MG-3, MG-4, MG-5 and MG-17 clearly indicates that selective catalytic reduction is the control technology of choice. MG-1, MG-3 and MG-4 are also subject to PSD and are subject to the BACT requirements. The BACT analyses are deficient in that they fail to reach conclusions that are supported by the PSD regulations, procedures or available information. Additional documentation is necessary to support the conclusion that PM-10 increment will not be violated on the road. The proposed permit does not clearly define the ambient air boundary, nor does it adequately preclude public access. As a result, Region 10 considers the proposed permit, if issued, to be in

violation of the Clean Air Act and its implementing regulations.

Cominco Alaska Incorporated
Red Dog Mine
P.O. Box 1230
Kotzebue, Alaska 99752
Tel. (907) 426-2170

October 8, 1999

Ms. Anita Frankel
United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

RE: EPA Review of Cominco Alaska Incorporated (Cominco) PSD Permit

Dear Ms. Frankel:

Cominco has reviewed your letter of September 28, 1999, to Mr. Tom Chapple of the Alaska Department of Environmental Conservation (ADEC) regarding the ongoing air permitting effort for Cominco's Red Dog mine. Cominco offers the following general observations and comments. In addition, Cominco requests a meeting with EPA to discuss, in detail, each concern raised in your letter.

Since the initial permit application submission in June 1998, Cominco has been working very closely with ADEC to provide all of the information necessary for ADEC to thoroughly analyze the project and finalize the permit. Cominco undertook this expensive and time-consuming effort with the understanding that ADEC, through the EPA-approved State Implementation Plan (SIP), has the principal authority and discretion to prepare and issue Prevention of Significant Deterioration (PSD) permits in Alaska. Cominco was disheartened to learn that EPA has interjected itself and dis-

rupted the final stages of the permitting process, even though EPA did not provide comments during the public comment period and did not otherwise contact Cominco to obtain relevant and accurate information. Cominco questions the value of having developed a good working relationship with ADEC if EPA is not, in practice, willing to recognize the authority and discretion given to ADEC through the SIP approval process.

Best Available Control Technology (BACT)

Cominco believes that ADEC acted correctly in determining that the "Low NOx" modification is BACT for the Wartsila engines, based on a balanced weighing of environmental, energy, and economic considerations. Given EPA's assertion that SCR "has been available since the early 1990's," Cominco questions why EPA has targeted this permit action to dispute whether SCR represents BACT when all other ADEC-approved PSD applications in the 1990's for similar engines have rejected SCR as BACT without objection from EPA. Furthermore, EPA has recently approved Low NOx technology over SCR in several other regional and national decisions.

PSD Applicability to Units MG-1, MG-3, and MG-4

Cominco disagrees with EPA's PSD applicability analysis for units MG-1, MG-3, and MG-4. These units represent the three Wartsila engines that were permitted in 1988 to operate without restriction. These three engines underwent PSD review at that time. None of the changes made at the facility have effected ADEC's intent to allow the full-time operation of three Wartsila engines as permitted in 1988.

* * *

Cominco looks forward to discussing these issues in detail with EPA. I will continue to work with ADEC and EPA to finalize meeting arrangements.

Sincerely,

/s/
Charlotte L. MacCay
Senior Administrator, Environmental and Regulatory Affairs

cc: Michele Brown ADEC
Tom Chapple ADEC
John Key CAK
Jim Kulas CAK

Cominco Alaska Incorporated
Red Dog Mine
P.O. Box 1230
Kotzebue, Alaska 99752
Tel. (907) 426-2170

MEMORANDUM

October 29, 1999

To: Chuck Findley, EPA Region X

From: Charlotte MacCay, Cominco Alaska Incorporated

Re: EPA's Oversight of the ADEC PSD Permit for the Red Dog Mine

EPA requested that Cominco Alaska Incorporated submit an analysis of the specific economic impacts of requiring SCR at the Red Dog Operations with a projection of the cost per unit of production related to the costs of installing and operating SCR on the new Wartsila engine. Cominco Alaska strongly feels that BACT decisions should not, according to EPA's own guidelines, consider specific economic impacts or profitability. Accordingly, as well as for additional concerns related to confidentiality, Cominco Alaska will not be providing this analysis. However, as I mentioned at our recent meeting in Anchorage, I will submit the general economic status for Cominco Alaska.

The capital investment required to construct the Red Dog Operations remains a considerable debt to be recovered. At this time, we are roughly $400 million dollars in debt on this investment. Additionally, due to an unexpected drop in zinc prices around the time that the mine was commissioned Cominco Alaska lost over $150 million dollars in operating costs. During this same period of time, over $50 million

dollars of additional capital costs were invested in environmental improvements. While the last couple of years have proven to be profitable, Cominco Alaska's overall debt remains quite high.

Industrial development in rural Alaska is essential for one of the poorest regions of the state and nation. However, it is difficult to attract industrial development to this region due to the high investment required to overcome the lack of infrastructure and the lack of regional power. While industry in the rest of the nation enjoys available regional power, often provided through federal funding for rural electrification, we in rural Alaska do not have this basic provision. Here, development requires the unusual cost of constructing a power generation facility. The imposition of higher cost air quality controls for power generated by private industry over power generated by public utilities creates a cumulative and uncommon economic burden.

Cominco Alaska believes the State of Alaska has the specific understanding to make the BACT decision for the Red Dog Operations. We also believe the State has the authority to make this decision. We respectfully supply the attached memo regarding EPA's role in oversight of the approved PSD program.

Sincerely,

/s/
Charlotte L. MacCay
Senior Administrator, Environmental and Regulatory Affairs

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

NOV 10 1999

Reply To
Attn Of: OAQ-107

Michele Brown, Commissioner
Alaska Department of Environmental Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska 99810-1795

Dear Ms. Brown:

This letter is in response to our recent meeting with Cominco Alaska Incorporated (Cominco) regarding the Department of Environmental Conservation's (ADEC's) proposed draft Permit to Construct for Cominco's Red Dog mine site. I would first like to thank you and your staff for taking the time to meet on October 21, 1999, to discuss Cominco's Production Rate Increase Project. I believe the meeting was successful in resolving some and clarifying all of the issues concerning the proposed Prevention of Significant Deterioration (PSD) permit drafted by ADEC. I am writing you to summarize our current position on each issue in hopes that we can quickly find a solution agreeable to everyone. As we discussed in that meeting, we have been able to narrow the discussions to what I see as five distinct issues. Each of these issues is reviewed below including the understanding I have based on our last meeting.

ISSUE #1: What is U.S. Environmental Protection Agency's (EPA's) role in the PSD permitting process in Alaska?

During the meeting both ADEC and Cominco questioned EPA's role in ADEC-issued PSD permits, noting that EPA should not be involved unless the State's decision is erroneous or arbitrary. We disagree and strongly believe that EPA has a statutorily mandated role in the PSD permitting process in Alaska and in the rest of the nation. As explained below and communicated during our meeting, we believe ADEC's conclusions are not supported by the record and are therefore arbitrary and erroneous.

As outlined later in this letter, the Cominco permit as proposed does not comply with the PSD provisions of the Clean Air Act. Section 167 of the Act, 42 U.S.C. § 7477, provides EPA with the authority to act in precisely this kind of situation. Specifically, Section 167 provides that the Administrator shall take such measures, including issuance of an order, as necessary to prevent the construction or modification of a major emitting faciiity which does not conform to the requirements of Part C of the Act. Additionally, it is the Agency's policy that when a regional office determines that a permitting authority is likely to grant an improper permit, the appropriate response is to issue a section 167 order demanding that the permit not be issued. In this instance, because the proposed permit would allow Cominco to construct a major source without requiring BACT it is entirely appropriate for EPA to exercise its statutory authority. Contrary to Cominco's arguments on this point, there is no relevant case law supporting the proposition that EPA's involvement prior to the issuance of the PSD permit is inappropriate.

ISSUE #2: Is installing and operating selective catalytic reduction (SCR) on emission units MG-5 and MG-17 economically infeasible?

As discussed in more detail below, consideration of the collateral issues of energy, environmental or economic

impacts and other costs do not justify elimination of SCR as BACT in this case. We believe that ADEC's own analysis supports the determination that BACT is SCR, which renders ADEC's decision in the proposed permit erroneous.

As we discussed at the meeting, EPA does not believe that the cost effectiveness stated in the final Technical Analysis Report (final TAR) to the draft Permit indicates that the installation of SCR is economically infeasible. These costs are well within the range of costs EPA has seen permitting authorities nationwide accept as economically feasible for NOx control except where there are compelling site specific factors that indicate otherwise. Furthermore, in the preliminary Technical Analysis Report (preliminary TAR) ADEC indicated the costs for SCR were "well within" what ADEC considers economically feasible (preliminary TAR at p. 41). The ADEC's record does not support its change in its decision as stated in the final TAR that SCR is not economically feasible.

ADEC has expressed the concern that if SCR is required at Cominco, then SCR would automatically be required for new or modified engines at rural electric utilities. The concern is understandable given the essential nature of the service provided by the rural utilities in Alaska. We share your concern regarding the cost of electricity in rural Alaska and the impact of those costs on the rate payers. In accordance with EPA guidance and case law, BACT determinations are made based on individualized consideration of the specific facts and circumstances at the facility being permitted. Specifically, once the most effective technically available control technology is identified, the collateral issues of "energy, environmental, and economic impacts and other costs" (18 AAC 50.990(13)) are considered. Consideration of these collateral issues may operate as a 'safety valve' when circumstances unique to a specific facility justifies use of a less effective technology. The significant and unique local factors associated with rural electric utilities serving small Alaskan communities would be specifically analyzed

in any BACT determination involving the rural utility. We are currently reviewing such an analysis for Nome Joint Utility System (NJUS) and have provided you with a letter regarding that proposed permit and continue to support analyzing the energy, economic, and environmental impacts and other costs in determining BACT. As noted in the letter on NJUS, it's status as a non-profit, isolated public utility, influences how those "other costs" are considered in determining BACT.

ISSUE #3: Will the emissions from units MG-1, MG-3, MG-4, and MG-5 be allowed to increase?

As the permit is currently drafted we believe that the four "bubbled" generators are subject to PSD and BACT. During our meeting I suggested this dispute could be avoided if the potential to emit for the generators (MG-1, MG-3, MG-4 and MG-5) were not increased. In order to accomplish this, I suggested that Cominco consider installing Low-NOx on the engines listed above in order to keep emissions from all four engines less than the emission cap of 2,259 tons of NOx per year. Preliminary calculations conducted by Mr. Trbovich confirmed that Cominco could comply with this emissions cap on these four units if low NOx technology were installed on the units. I made this proposal in an effort to reduce the areas of disagreement between Cominco and EPA since this could eliminate further discussions of what constitutes BACT for unit MG-5 and avoid further debate on the need to install BACT on the remaining generating units. To that end, I propose that Cominco document that emissions from these 4 engines would remain under the emissions cap. Refurbishment of the generating units with the Low-NOx technologies may occur on a staggered basis as opposed to immediate installation upon the issuance of the PSD permit. If this approach is not implemented, then EPA's position remains that BACT is required for MG-1, MG-3, MG-4, MG-5 and MG-17.

* * *

Summary

I hope this furthers our Agency's mutual desire to resolve this matter in a timely and effective manner. I look forward to our continued collaboration.

Sincerely,

/s/
Chuck Findley
Deputy Regional Administrator

cc: Tom Chapple, ADEC
John Stone, ADEC

Charlotte MacCay
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Mr. Chuck Clark, Regional Administrator
United States Environmental Protection Agency Region 10
1200 Sixth Avenue
Seattle, Washington 98101

Dear Mr. Clark:

Thank you for meeting with Doug Horswill and me on November 23, 1999 to discuss air permitting issues at Com nco's Red Dog mine. We sincerely appreciate your willingness to help resolve the remaining differences that have developed between the state of Alaska and EPA over the state's Best Available Control Technology (BACT) determination. Alaska decided that a technology known as Low NOx is BACT for two of the diesel-fired reciprocating engines used to generate power at the mine, and that selective catalytic reduction (SCR) is not.

You asked us to furnish to you the economic information we alluded to during our meeting supporting the state's BACT decision, and Cominco's strong belief that SCR is not BACT for the diesel engines. This letter provides that information. Also because BACT analysis consider and weigh energy, environmental, and economic impacts and other costs, we have briefly summarized the information on those factors, in order to help you make a judgment on whether Alaska's decision is "clearly erroneous," as it must be for EPA to appeal it.

Economic Considerations.

1. What is EPA's Own Economic Standard for BACT Determinations? The standard EPA has applied in determining cost effectiveness in most cases is that spelled out by EPA's Appeals Board, namely that the cost is "either within or outside the range of costs being borne by similar sources under recent BACT determinations." *In Re Interpower of New York, Inc. PSD Appeals Nos. 92-8, 92-9*, (March 6, 1994) at page 23. EPA's draft New Source Review Workshop Manual (1990) (draft NSR Manual) states that in order to justify rejection of an alternative such as SCR:

> ". . . the applicant should demonstrate to the satisfaction of the permitting agency that costs of pollutant removal (e.g., dollars per total ton removed) for the control alternative are disproportionately high when compared to the cost of control for the pollutant in recent determinations."

Draft NSR Manual at 45.

2. Applying EPA's Cost-Effectiveness Standard. Based on our thorough review of EPA's RACT/BACT/LAER clearinghouse (see table of all recent RACT/BACT/LAER determinations for diesel-fired reciprocating engines attached as Attachment A), and Freedom of Information Act inquiries to states indicated, we find that **EPA has not required SCR as BACT on a diesel-fired reciprocating engine in any case, nor has any state**. These include several cases where the cost per ton of NOx reduction for SCR would have been less than they would be at Red Dog, and where the resulting public exposure to NOx was far greater than that projected at Red Dog.

a. Costs Borne by Similar Sources in Similar Circumstances in Recent Determinations. Diesel-fired reciprocating engines in the cities of Saint Paul (1996), Unalaska (1996), Ketchikan (1999, limited operation), and Nome (draft 1999), all in Alaska, and probably more similar than the other BACT determinations listed, have received recent Best

Available Control Technology determinations that considered and rejected SCR, and required less control than provided by the Low NOx technology being required by the state for Red Dog. Even under the far more stringent requirement applicable in nonattainment areas exceeding the health standard, namely, Lowest Achievable Emission Rate (LAER), the most recent determination in California did not require SCR (Tracy Material Recovery Plant, 1997). The only cases in which SCR has been required on such engines are not BACT determinations, but LAER determinations (Philadelphia NE Water Treatment Plant, 1992, ozone nonattainment area (NOx a precursor of ozone)) and (Ross Island Sand and Gravel, CA, 1996) where the health damage to which the NOx emissions contributed justified the disproportionate expense and other adverse environmental risks of SCR. In summary, there are no similar sources in similar circumstances in recent determinations that have been required to bear the disproportionate costs of SCR.

Even if one considers the costs borne by dissimilar sources in circumstances more favorable for operation of SCR than at Red Dog, SCR has been rejected as BACT. That is true of the Northstar PSD permit for combustion turbines on the North Slope (1999). It is also true for two 20 megawatt combustion turbine generators in Hawaii, where EPA upheld the state of Hawaii's rejection of SCR based on its determination that SCR was "not fully demonstrated for long-term operations on combustion turbine generators operating in simple cycle mode." *In Re: Maul Elec. Co.*, 1998 WL 666709, PSD Appeal No. 98-2 (EAB 1998).

There have been several other appeals, by EPA Regions and others, of determinations by states that SCR was not required. In every one of those cases, the state has been upheld. *In the Matter of Old Dominion Elec. Coop.*, 1992 WL 92372, PSD App. No. 91-39 (EAB 1992), *In the Matter of: Hawaiian Commercial and Sugar Co.*, 1992 WL 191948, PSD App. No. 92-1(EAB 1992), *In the Matter of: Mecklenburg Cogeneration Ltd. Partnership* 1990 EPA App. Lexis

42, PSD App. No. 90-7 (EAB 1990). In one of these cases that appealed a determination by the state of Virginia that SCR was not BACT, the Administrator of EPA stated that:

> Even though EPA Region III, for example, might well have arrived at a different determination had it been the permit issuer of record, the Petitioners have not persuaded me that the State's choice represents clear error, because the evidence "for" and "against" SCR was . . . in such close balance.

In the Matter of Old Dominion Electric Cooperative, 1992 WL 92372, PSD Appeal No. 91-39 (EAB, July 20, 1992).

In the only case we have been able to find where EPA disagreed with a state on what constituted BACT (EPA preferred water injection, the state found "operation by design" to be BACT), and issued a section 167 order, the court found that EPA did not have authority to issue a section 167 order collaterally attacking the permit, *U.S. v. Solar Turbines*, 732 F. Supp. 535 (M.D.Pa. 1989).

b. Rejection of SCR and Other Technologies Due to High Cost. Cominco has demonstrated that at Red Dog the cost per ton of NOx removed for SCR would be $5,640. This cost includes the real world cost of an arctic installation, supplemental boiler, and production lost due to shutdown during installation. Even without including these substantial costs, Alaska determined that SCR would cost $2100 per ton of NOx removed for new engine MG-17. This includes a total installed capital cost of SCR that is nearly 10 times that for low NOx and a total annualized cost of SCR more than 12 times the total annualized cost for Low NOx. For MG-17, therefore, SCR has an additional cost per year of over $1 million more than Low NOx. With an expected mine life of at least 40 more years, these costs are very significant, substantially affecting Cominco's cost of production. The costs borne by other sources, included those enumerated above, are a small fraction of these costs.

EPA has also upheld challenges to the rejection of SCR as BACT due to its high cost. For instance, in a 1997 BACT case, the EPA Environmental Appeals Board held that petitioners faded to demonstrate that Virginia's finding of $8,500 per ton of NOx removed was within the range of control costs borne by similar sources. *In re Commonwealth Chesapeake Corp.*, 1997 WL 94742, PSD Permit App. Nos. 96-2 through 96-5 (EAB 1997). Similarly, in a Reasonably Available Control Technology case (not BACT, but economically similar, requiring a control technology that is "reasonably available considering technological and economical feasibility"), the Washington Pollution Control Board found that costs for SCR between $1,186 and $1,837 per ton of NOx removed were not cost-effective and did not represent an "economically feasible" control technology, and that instead Low NOx technology costing approximately $112 to $233 per ton of NOx removed should be installed on a large coal-fired generating plant. *Bowers v. Southwest Air Pollution Control Authority*, 1999 WL 198964, Washington Pollution Control Board, Nos. 98-3 and 31, 1999). Likewise, EPA's EAB rejected costs between $4,000 and $6,000 per ton of SO2 removed as not cost-effective. *In Re: Inter-Power of New York, Inc.*, 1994 EPA App. Lexis 33, PSD App. Nos. 92-8 and 92-9 (EAB 1994).

Cominco submits that this information on economic costs establishes that (1) that no similar sources have borne the costs of SCR in recent determinations, and (2) that the cost of SCR is disproportionate to costs borne by similar sources in recent determinations. More importantly, this information demonstrates conclusively that Alaska's BACT determination of Low NOx as BACT at Red Dog is reasonable and not clear error that would justify EPA intervention.

Environmental Impacts of SCR and the Low NOx Modification.

The difference in total environmental impacts of NOx emissions predicted from Low NOx rather SCR as BACT on

two engines at Red Dog is the virtually insignificant amount of 1.6 micrograms per cubic meter ($\mu g/m^3$). For one engine, the impact would be approximately half that amount, and thus below EPA's de minimus impact levels. No public presence or residence exists within tens of miles of the Red Dog mine.

However, SCR requires the use of ammonia. A real risk, however small, exists for an ammonia release and worker exposure from the use of SCR at the Red Dog mine. Ammonia can cause serious injury or death. OSHA statistics show that the storage, use and handling of ammonia results in hundred of industrial accidents every year. At the Red Dog mine, that risk would be presented immediately adjacent to the residential quarters, under severe arctic conditions, in a remote area. In the case of *Blackhills Power and Light Co.*, 1993 WL 474540, the Wyoming Department of Environmental Quality rejected SCR in part for its adverse environmental risks, including "the danger to personal safety in delivering, storing and using ammonia (NH3) onsite, the creation of sulfuric acid mist, the problem in disposing of the catalyst of an SCR system, which is a hazardous material, excessive ammonia slip, [and] ammonia odor, ..." (Docket No. 2476-93,1993).

Energy Impacts.

For each unit on which SCR was installed, Cominco would be required to burn up to 531,730 gallons per year of additional diesel fuel to replace the waste heat unit loss caused by installing SCR rather than utilizing that waste heat. It would also be required to haul that amount of additional fuel from the Red Dog port by truck, creating additional emissions that would not be released if Low NOx were determined to be BACT.

Conclusion.

Taken together, we hope that you will agree that there are sufficient economic, environmental and energy bases in the

case of Red Dog's PRI PSD air permit for the state of Alaska to reject SCR as BACT, and to require Low NOx. In view of the information presented, we also hope you will concur that there is no further need for disagreement, controversy, or dispute resolution, and that Cominco may proceed on the long-delayed permit for Red Dog's much-needed and beneficial Production Rate Increase.

Please let us know if you have any questions or if we can provide further information to assist you in your determination.

Sincerely,

/s/
John Key

cc: Michele Brown, ADEC
Tom Chapple, ADEC
Chuck Findley, EPA Region 10
Doug Horswill, Cominco

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

DEC 10 1999

Reply To
Attn Of: OAQ-107

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Michele Brown
Alaska Department of Environmental Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska 99801-1795

Re: Proposed PSD Permit for Cominco Alaska, Inc.

Dear Ms. Brown:

This letter is in follow-up to our recent conversations regarding the Alaska Department of Environmental Conservation's (ADEC's) proposed prevention of significant deterioration (PSD) permit for Cominco Alaska Incorporated (Cominco). As we have discussed, it is EPA's assessment that the permit as currently drafted does not comply with the PSD provisions of the Clean Air Act (Act) or the Alaska State Implementation Plan (SIP). In spite of our concerns, I want to reiterate statements made in previous communications to you. First, EPA is committed to working with ADEC to resolve the best available control technology (BACT) issues related to this permit. Second, while ADEC retains the permitting authority over the PSD program in the State of Alaska, EPA retains federal oversight authority as part of its responsibility to ensure national consistency. Thus, EPA will continue to review nationally significant issues and will review a State permitting decision on a case-

by-case basis when appropriate. Sections 113 and 167 of the Act provide EPA with the authority and responsibility to act in precisely this type of situation. Accordingly, the enclosed Finding and Order is issued under the authority of sections 113 and 167 of the Clean Air Act, 42 U.S.C. §§ 7413 and 7477.

It appears that there are two primary issues remaining in dispute: 1) emission limits for Wartsila generators MG-1, MG-3, and MG-4; and 2) the BACT determination for generators MG-5 and MG-17. I understand that ADEC and Cominco have agreed to permit conditions that would require low NOx controls on MG-1, MG-3, MG-4, and MG-5, and emission limits that reflect the previous "bubbled" limits. Under this approach, the permit would result in no increase in actual or allowable emissions from any of these engines and the installation of BACT would not be necessary for these four units. Assuming that the applicability or BACT determinations for MG-17 and other aspects of the production rate increase project will not be affected, this approach appears reasonable. Thus, if ADEC issues the PSD permit to Cominco with these provisions and others as discussed in the attached Order, the permit will comply with the Act and the Alaska SIP as it applies to these four generators, and Cominco may proceed with its production rate increase project in all aspects, except for new Wartsila generator MG-17.

The remaining issue is the BACT determination for MG-17. As we have stated previously, EPA believes that ADEC's own analysis supports the determination that BACT is selective catalytic reduction (SCR), and that ADEC's decision in the proposed permit therefore is both arbitrary and erroneous. The State's analysis as reflected in both the preliminary and final technical analysis reports indicates that SCR is technically feasible. Furthermore, contrary to ADEC's final conclusions, the State's record reflects that the cost-effectiveness and the collateral issues of energy, environmental, or economic impacts, and other costs, do not

justify failure to select SCR as BACT in this case. EPA does not believe that the cost-effectiveness analysis in the final technical analysis report demonstrates that the installation of SCR is economically infeasible. These costs are well within the range of costs EPA has seen permitting authorities nationwide accept as economically feasible for NOx control, except where there are compelling site-specific factors that indicate otherwise. Additionally, in the preliminary technical analysis report, p. 41, ADEC indicated the costs for SCR were "well within" what ADEC considers economically feasible. ADEC's record simply does not support its decision that BACT for MG-5 or MG-17 is low NOx controls rather than SCR.

In an effort to resolve the issue regarding BACT for MG-17, we are willing to continue discussions with ADEC and Cominco. In this vein I suggest that the three parties agree to utilize a third-party to facilitate non-binding negotiations. We are available to review and consider any additional information or analyses provided by ADEC or Cominco to support a determination that SCR is not BACT for modified or new Wartsila generators at the Red Dog mine facility. Utilizing a facilitator would not limit or restrict EPA's, ADEC's, or Cominco's authority, or defenses currently available to any of us, under existing law or regulation, but may provide a useful forum for continued negotiation on this issue. Furthermore, according to communications with Cominco, the new Wartsila generator MG-17 will not be on-site until next summer and NOx controls may be ordered and installed after shipping. Thus, Cominco's scheduling should not be significantly affected by the additional time needed to resolve this issue.

I recognize that it may take some time to resolve the disputed issues regarding this permit. Therefore, consistent with EPA's federal oversight role and to preserve EPA's authority during any additional negotiations regarding the Cominco permit, the enclosed Finding of Noncompliance and Order is issued.

Please call Douglas Hardesty, Office of Air Quality (206-553-6641) or me (206-553-0479), at your earliest convenience to discuss how you would like to proceed, and/or to begin scheduling and arrangements for a facilitator. Additionally, I encourage you to call either of us if you have questions regarding the enclosed Finding of Noncompliance and Order.

Sincerely,

/s/
Chuck Findley
Deputy Regional Administrator

Enclosure
cc: John Keys, Cominco

Bcc: Chuck Findley
Carol Holmes, OECA
Greg Foote, OGC
Karen Blanchard, OAQPS
Ray Nye, OAQ
John Keenan, OAQ
Rob Wilson, OEA
Julie Matthews, ORC
Source file

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

AIR QUALITY CONSTRUCTION PERMIT

Permit No. 9932-AC005 Issue Date: December 10, 1999

The Department of Environmental Conservation (the Department), under the authority of AS 46.03, AS 46.14, 6 AAC 50, 18 AAC 15, and 18 AAC 50, issues this Construction Permit to

The Permittee:

Cominco Alaska, Incorporated
P.O. Box 1230
Kotzebue, AK 99752

For the:

Red Dog Mine Facility
145 km northeast of Kotzebue, Alaska
UTM Coordinates Northing 7551 km, Easting 590 km
Zone 3

In accordance with AS 46.14.130(a), this permit allows the permittee to modify the facility in accordance with terms and conditions of this permit. This permit contains terms and conditions necessary to ensure that the permittee will build and operate the facility in accordance with 18 AAC 50.315(e).

/s/ December 10, 1999

Tom Chapple, Director Date
Division of Air & Water Quality

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* * *

14. Nitrogen Dioxide Requirements. The permittee shall comply with the following requirements for Sources MG- 1 through MG-6 and MG-17:

14.1 Oxides of nitrogen emissions, expressed as NO_2, shall not exceed 3,878 tons in any 12 consecutive month period.

14.2 For each calendar month, record the hours of operation of each source.

14.3 For each calendar month, calculate and record the emissions from each source and the emissions from all sources during the most recent 12 consecutive month period. Use the following equation and emission factors to calculate the monthly NOx emission rate, M, for each source. The Department, in its discretion, will adjust the emission factors based upon the results of source tests conducted according to the procedures specified in Section 9 of this permit. Upon receiving a written request or approval from the Department, the permittee shall use the adjusted emission factors.

M = Emission Factor x (hours of operation each month) x (1 ton/2000 lb)

Emission Factors:

Source MG-1 = 182.6 lbs/hour
Source MG-2 = 135.0 lbs/hour
Source MG-3 = 195.1 lbs/hour
Source MG-4 = 198.8 lbs/hour
Source MG-5 = 173.3 lbs/hour
Source MG-6 = 135.0 lbs/hour
Source MG-17 = 121.3 lbs/hour

14.4 Report the records required by this condition by submitting a copy of the records with the Facility Operating Report required by Condition 26 of Permit No. 9332-AA003.

* * *

18. Limits to Avoid PSD for Oxides of Nitrogen. To avoid PSD review for oxides of nitrogen, the permittee shall comply with the requirements of this section to limit the facility's potential to emit.

18.1 Limit the emissions of oxides of nitrogen from the Wartsila Generators, Sources MG-1, MG-3, MG-4, and MG-5 to no greater than 2259 tons in any 12 consecutive month period.

a. For each calendar month, record the hours of operation of each source.

b. For each calendar month, calculate and record the emissions from each source and the emissions from all sources during the most recent 12 consecutive month period. Use the following equation and emission factors to calculate the monthly NOx emission rate, M, for each source. The Department, in its discretion, will adjust the emission factors based upon the results of source tests conducted according the procedures specified in Section 9 of this permit. Upon receiving a written request or approval from the Department, the permittee shall use the adjusted emission factors.

M = Emission Factor x (hours of operation each month) x (1 ton/2000 lb)

Emission Factors:

Source MG-1 = 182.6 lbs/hour
Source MG-3 = 195.1 lbs/hour
Source MG-4 = 198.8 lbs/hour
Source MG-5 = 173.3 lb/hour

c. Report the records required this condition by submitting a copy of the records with the Facility Operating Report required by Condition 26 of Permit No. 9332-AA003.

* * *

Section 4. Best Available Control Technology (BACT) for Oxides of Nitrogen (NOx)

This section of the permit contains the requirements for NOx BACT imposed by this permit action. The BACT limits for the Wartsila Generators, MG-1, MG-3, and MG-4 originate from the BACT limits contained in the 1988 permit. The limits were removed in a 1994 permit action and are reimposed in this permit action. The effective date of the reimposed limits is delayed so that the permittee can undertake actions to comply with the limits.

20. The permittee shall comply with the following requirements:

20.1 For the Wartsila Generator, Source MG-17,

a. Limit NOx emissions to no greater than 121.3 lb/hour, expressed as NO_2, averaged over any three hours.

b. Make no irrevocable commitment for equipment or engineering design prior to May 1, 2000 that would preclude SCR as an emission control technology.

c. Do not commence permanent on-site construction of the MG-17 installation project before June 1, 2000. Within 30 days after construction commences, provide the De-

partment written notification of the date on-site construction commences.

d. Within 180 days after startup, conduct source tests to determine compliance with the NOx emission limit and report the results in accordance with the requirements set forth in Section 9 of this permit.

20.2 For the Wartsila Generators, Sources MG-1, MG-3, MG-4, and MG-5,

a. By December 31, 2000, limit NOx emissions of each source to no greater than 750 parts per million, corrected to 15 per cent oxygen in the exhaust, averaged over any three hours.

b. By December 31, 2000, conduct source tests on each source to determine compliance with the NOx emission limit in Condition 20.2a and report the results in accordance with the requirements set forth in Section 9 of this permit.

* * *

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Juneau, Alaska

FINAL
TECHNICAL ANALYSIS REPORT
For Air Quality Control Construction Permit No. 9932-AC005

Cominco Alaska, Inc.
Prevention of Significant Deterioration
Red Dog Mine Production Rate Increase

December 10, 1999

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ABBREVIATIONS AND ACRONYMS

BACT	Best Available Control Technology
CEM	Continuous Emission Monitor
CFR	U.S. Code of Federal Regulations
CO	Carbon Monoxide
DEC	Alaska Department of Environmental Conservation
EGR	Exhaust Gas Re-circulation
EPA	U. S. Environmental Protection Agency
ESP	Electrostatic Precipitator
FITR	Fuel Injection Timing Retard
hp	Horsepower
hr	Hour
H_2S	Hydrogen Sulfide
ISO Conditions	288K, 60 pct relative humidity and 101.3 kilopascals pressure
KW	Kilowatts
LAER	Lowest Available Emission Rate
MMBtu	Million British thermal units
NAAQS	National Ambient Air Quality Standards
NESHAP	National Emission Standards for Hazardous Air Pollutants
NSCR	Non-Selective Catalytic Reduction
NSPS	New Source Performance Standards
NO	Nitric Oxide
NOx	Oxides of nitrogen
NO_2	Nitrogen Dioxide
OLM	Ozone Limiting Method
OSHA	Occupational Safety and Health Administration
PM	Particulate matter
PM-10	Particulate matter (10 micrometers or less in size)
ppmdv	Parts per million, dry volume basis

PSD	Prevention of Significant Deterioration
SCO	Selective Catalytic Oxidation
SCR	Selective Catalytic Reduction
SNCR	Selective Non-Catalytic Reduction
SO_2	Sulfur Dioxide
TSP	Total suspended particulate (30 micrometers or less)
VOC	Volatile organic compounds
$\mu g/m^3$	Microgram per cubic meter

1. EXECUTIVE SUMMARY

The executive summary contains the following: an outline of the report; a brief summary of the facility; the proposed project; a history of pre-construction reviews conducted for the applicant's facility; a discussion regarding Prevention of Significant Deterioration (PSD) applicability; and a list of air quality control findings for the project.

Cominco Alaska, Inc. (Cominco), owns mineral rights and operates the Red Dog mine in northwest Alaska. The Red Dog mine is a surface zinc and lead ore mining operation located approximately 145 kilometers north of Kotzebue, Alaska. The facility is located on land owned by the NANA Regional Corporation and was developed jointly by Cominco and NANA. The Red Dog mine is situated in the DeLong Mountains of the western Brooks Range near the headwaters of the Wulik River. The topography of the area is mountainous with the nearby peaks reaching about 3,000 feet above sea level. Base elevation for the mine is approximately 1,000 feet above sea level.

On June 17, 1988, the Department issued an a Prevention of Significant Deterioration (PSD) permit to construct the Cominco Red Dog mine Project. Mining operations commenced in 1989. The projected mine life is about 50 years. The existing facility is classified under Standard Industrial Classification (SIC) code 1031 as Lead and Zinc Ores. The mine facilities include an open pit mine, rock crushing equipment, waste rock disposal sites, a tailings impoundment, a mill and concentrator, wastewater treatment facilities, and a concrete batch plant. Support facilities include power generation equipment, an airport, fuel handling and storage facilities, and personnel accommodations.

On July 27, 1994, the Department issued a PSD Permit to Operate No. 9332-AA003 to Cominco to install a sixth Wartsila diesel-electric generator to the Red Dog Project's power plant. The Red Dog mine currently operates under terms and conditions of Air Quality Control Permit to

Operate No. 9332-AA003, as amended December 4, 1996. Currently, ore and waste rock are removed at a rate of about 6,125,000 tons per year. The mill processes approximately 2,500,000 tons of ore annually, and produces 854,000 tons of concentrate.

On June 29, 1998, Cominco submitted an Air Quality Control Construction Permit application for the Production Rate Increase (PRI) project. The proposed production rate increase will raise Cominco's mill processing rate to 3,500,000 tons of ore per year, and will raise production of concentrate to 1,400,000 tons annually. On April 15, 1999, Cominco supplemented the PRI permit application to add another generator to the Red Dog Project power plant.

As part of the PRI project, the applicant proposes to remove air quality operating restrictions on power plant diesel generators, add a seventh 5 megawatt (MW) diesel generator, add a diesel generator set, add a new incinerator with restricted hours of operation, remove an existing incinerator, add 12 new heaters, add a diesel fuel storage tank, add a new ore crusher and baghouse, increase operating hours for the Assay Lab bucking room baghouse, increase fugitive emissions, and increase the holding capacity of the coarse ore stockpile building to support a production rate increase at the Red Dog mining facility. This application also seeks to correct errors in the previous permit and expands the list of permitted equipment to include small existing sources that were previously excluded. The applicant also requests approval for the use of sodium sulfide in the wastewater treatment plant for removal of cadmium metal from the water.

The proposed modification will result in an emission increase at the Red Dog mine of a sufficient magnitude to be classified as a modification. Therefore, the modification is subject to the PSD pre-construction review provisions under the State Air Quality Control Regulations. The Department has

completed its review of Cominco's PRI modification application and has made the following findings:

1. The application describes the facility as an existing mining and ore processing facility with diesel-fired electric generators and heaters having a combined potential to emit greater than 250 tons per year (tpy) of nitrogen oxides, carbon monoxide, and sulfur dioxide, as classified in 18 AAC 50.300(c).

2. The facility contains a source that must have an air contaminant control unit or system to comply with an emission standard set by 18 AAC 50.050 - 18 AAC 50.060, and has an industrial process with a total rated capacity or design throughput greater than five tons per hour as classified in 18 AAC 50.300(b)(1)(A).

3. The applicant proposes the following changes to sources at the Red Dog mine:

- permit 5 MW Wartsila generators (MG-1, 3, 4, and 5) to operate full time;
- add a seventh 5 MW Wartsila generator (MG-17) to operate full-time as a new source;
- add a new Advanced Combustion CA-500 incinerator with restricted hours of operation;
- remove the Kelly Hoskinson incinerator;
- add the new gyratory crusher;
- add a 1,200,000 gallon diesel-fuel storage tank;
- add a Cummins/Onan generator;
- add twelve new 100,000 Btu/hr diesel-fired heaters; and
- increase hours of operation of source MD-4.

4. Following the proposed modifications, the facility will contain one or more incinerators with a total combined rated capacity of 1,000 pounds per hour or more as classified in 18 AAC 50.300(b)(3).

5. The facility is classified as a "hazardous air contaminant major facility" because it has the potential to emit 25 tpy or more in aggregate of two or more hazardous air pollutants (HAPS). The facility emits 223 TPY of methanol and lessor quantities of other HAPs.

6. The proposal described in Finding 3 is a modification which may increase actual oxides of nitrogen (NOx) emissions by up to 1,100 tons per year; carbon monoxide (CO) emissions by 90 tons per year; particulate matter (PM) emissions by 35 tons per year; emissions of particulate matter smaller than 10 microns (PM_{10}) by 35 tons per year; volatile organic compound (VOC) emissions by 59 tons per year; and lead (Pb) by 0.46 tons per year. The proposal also results in a decrease in sulfur dioxide (SO_2) emissions by 37 tons per year due to using reduced sulfur fuel.

7. The new crusher, the mill building vents, truck unloading at the crusher, and the portable screen are subject to federal New Source Performance Standards (NSPS) 40 CFR 60, Subpart LL, as affected facilities at a metallic mineral processing facility. The units are subject to federal emission standards for particulate matter, incorporated by reference in Alaska Air Quality Control regulation 18 AAC 50.040(a)(2)(X).

8. The existing portable crusher and portable screen are affected facilities subject to federal New Source Performance Standards (NSPS) 40 CFR 60, Subpart OOO, at a nonmetallic mineral processing plant. The units are used to crush gravel for maintenance and construction aggregate. The units are subject to federal emission standards for particulate matter, incorporated by reference in Alaska Air Quality Control Regulation 18 AAC 50.040(a)(2)(FF).

9. The new diesel storage tank is subject to federal New Source Performance Standards (NSPS) 40 CFR 60, Subpart Kb, incorporated by reference in Alaska Air Quality Control regulation 18 AAC 50.040(a)(2)(M).

10. The existing and proposed incinerators are subject to the National Emissions Standards for Hazardous Air Pollutants (NESHAPS), 40 CFR 61, Subpart E, Emissions Standards for Mercury, incorporated by reference in Alaska Air Quality Control Regulation 18 AAC 50.040(b)(2)(A).

11. The proposed potential to emit NOx, SO_2, PM/PM_{10}, CO, VOC, and Pb will not cause or contribute to violations of the ambient air quality standards and PSD increments, subject to operational limits proposed by the applicant.

12. The emissions increases are greater than the PSD significant increase thresholds listed in 18 AAC 50.300(h)(3)(B)(ii), (iv), (v) and (vi); therefore, the Department will assess the best available control technology (BACT) for NOx, PM/PM_{10}, and VOC.

13. The applicant proposes the following controls as BACT: Low emission configuration with NOx fuel injection timing controls for MG-17. Good operational practices for PM and VOC emission controls from the diesel engines, heaters, and baghouse controls for industrial processes.

14. To protect SO_2 ambient standards and increments, the applicant proposes to burn distillate fuel oil with a maximum sulfur content of 0.45 percent (pct) by weight per purchase. The applicant proposes to burn distillate fuel oil with a maximum sulfur content of 0.45 pct by weight per purchase and 0.16 pct by weight annually for distillate fuel oil purchased after the permit issue date and delivered after January 1, 2000. The 0.16% by weight annual fuel sulfur average avoids classification under 18 AAC 50.300(h)(3)(B)(iii).

15. Emissions from the proposed sources will not impair visibility within Class I Areas and will not impair integral vistas identified in 18 AAC 50.015(c)(2) and 50.025(a).

16. The proposed emissions may have the potential to cause adverse vegetation impacts outside of the ambient air quality boundary, as indicated in Cominco's application.

17. Cominco has determined that the Red Dog Mine production rate increase is subject to the Alaska Coastal Management Program (ACMP). Therefore, the applicant submitted an Alaska Coastal Project Questionnaire (CPQ). The Department is reviewing the project for consistency under the ACMP. The ACMP reviewing agency must find the project consistent in order for the Department to issue a construction permit for the project.

Based on the review under 18 AAC 50.315(b)-(e), the Department proposes to issue the applicant Air Quality Control Construction Permit No. 9332-AC005 for the Red Dog mine.

2. INTRODUCTION

This Introduction Section describes the federal and State PSD Program components, project location, project description, facility emission inventory, and applicant's obligations under the PSD program.

The Federal Clean Air Act established the PSD program to manage air quality by evaluating the emission controls and potential ambient air quality impacts from proposed new or modified major stationary sources. The U.S. Environmental Protection Agency (EPA) has approved Alaska's PSD pre-construction review program for new or modified stationary sources to the State of Alaska. The Alaska Air Quality Control Regulations, 18 AAC 50, contain the PSD pre-construction review program. Entities desiring to build or modify a facility subject to the PSD pre-construction review program must submit an application to the Department prior

to constructing the facility or modification. The Department then reviews the emissions, proposed controls, and predicted ambient impacts, to determine whether the proposed facility/modification complies with the air quality standards and program requirements. Some of the emission sources associated with this permit have already been constructed prior to departmental review.

The facility is a "major" source as classified in 18 AAC 50.300(c)(1). The application describes a proposed modification classified as PSD-significant in 18 AAC 50.300(h)(3). Therefore, the Department requires this project to undergo pre-construction review under the PSD program and obtain an Air Quality Control Construction Permit. This review includes:

1. evaluating the potential to emit (PTE) from the facility and modification as restricted by emission or operational limitations;
2. determining the State and federal emission standards applicable to the project's emitting sources and the project's compliance with emission standards;
3. evaluating Best Available Control Technology (BACT) for new or modified emission units and establishing emission or operating limits, which represent BACT;
4. determining the attainment status of the air shed;
5. reviewing air pollution monitoring data regarding existing air quality and meteorological data in the vicinity of the project;
6. identifying the ambient air quality boundary for the facility;
7. assessing ambient air quality impacts of the project and associated activities relative to National and State Ambient Air Quality Standards (AAQS) and PSD increments; and

8. evaluating impacts of the project and associated activities on air quality-related values such as visibility, deposition effects on lands and waters, and effects on vegetation.

2.1 PROJECT LOCATION

The facility is located in the DeLong Mountains of the western Brooks Range, approximately 145 kilometers north of Kotzebue near the headwaters of the Wulik River. The mine location is at latitude 68°04' N and longitude 162°50' W. The topography of the area is mountainous with the nearby peaks reaching about 3,000 feet above sea level. Base elevation for the mine is approximately 1,000 feet above sea level. The Cominco facility is located in the Northern Alaska Intrastate Air Quality Region.

The Department has classified the air quality surrounding the facility as in attainment or unclassified with respect to the AAQS. The nearest area designated as "non-attainment" for any criteria pollutant is the Fairbanks urban area which is non-attainment for carbon monoxide (CO). Fairbanks is located approximately 430 miles east-southeast of the facility. Due to the great distances and topography, the facility will have negligible impacts on the non-attainment area.

Areas in attainment with the AAQS are categorized as Class I, Class II, and Class III for the purpose of air quality maintenance, depending on the level of industrial growth expected, and the need to protect the air quality of the area. The U.S. Environmental Protection Agency has established ambient air quality increments for each class, with Class I areas being most restrictive. The facility area is designated as a Class II area. The nearest Class I area is Denali National Park, located 420 miles southeast of the facility. Because the facility is over 10 kilometers away from a Class I area, the secondary definition of a significant emission increase does not apply as set out in 18 AAC 50.300(h)(3)(xviii).

* * *

4. BEST AVAILABLE CONTROL TECHNOLOGY

The Department's goal for the best available control technology (BACT) review is to evaluate available technologies, identify BACT for the project's emission sources, and establish emission or operational limits which represent BACT. This review is conducted in accordance with State and federal rules and guidelines. In this section, the Department evaluates the available control technologies for each emission source and selects BACT. In addition, the Department assesses the level of monitoring, record keeping, and reporting necessary to ensure the applicant applies BACT.

Under the State of Alaska's PSD Provisions of the Air Quality Control Regulations, an applicant subject to preconstruction review must show that BACT will be installed and used for each new or modified source. BACT is defined as an emission limit that represents the maximum reduction achievable for each regulated air contaminant subject to preconstruction review under the PSD provisions of the Clean Air Act (CAA). For this project, BACT evaluation is required for the following contaminants: oxides of nitrogen (NOx), particulate matter (PM-10), and volatile organic compounds (VOC).

Application of BACT must not result in emission of any pollutant which would exceed the emissions allowed by any applicable federal standard listed in 40 CFR, Part 60 NSPS, and 40 CFR 61 National Emission Standards for Hazardous Air Pollutants (NESHAPS).

On a case-by-case basis, the Department, taking into account energy, environmental, and economic impacts, determines emission limits for new sources or modifications through the application of production, process, or available control systems and techniques. The Department identifies available control technology and evaluates the most effective control measure available for a stationary source for each pollutant.

The Department may propose a balanced approach reducing all air contaminants in an optimized manner, rather than achieving the maximum degree of emissions reduction for a single air contaminant.

The Department evaluates economic feasibility of BACT by comparing the control cost of each available control technology. If the Department determines that technological or economic constraints of the control system for a particular pollutant would make the imposition of an emission standard infeasible, the Department may prescribe a design, equipment, work practice, operational standard, or combination, to satisfy the requirement for BACT. The Department will set forth the emission reduction achievable through implementation of such design, equipment, work practice, or operation.

As part of a complete application, the applicant must provide an adequate demonstration that the proposed emission control system represents BACT for the project. The applicant prepares an economic comparison of available technologies by summing the annualized capital and operational costs for a given technology, and dividing the cost sum by the air contaminant emission rate reduction expected for that technology. This results in an incremental cost for comparison with other technologies analyzed, in terms of cost per ton of air contaminant reduced. The lower the cost per ton, the less expensive it is to employ that technology. The Department determines the economic feasibility threshold that reflects the appropriate site-specific level of control for the pollutant and new sources.

The most commonly used procedure for determining BACT is well documented. The procedure is called the "top-down" approach. The "top-down" methodology is set forth in the U.S. EPA's proposed *New Source Review Rule Revisions* (EPA 1990). EPA has published numerous policy memorandums and guidance documents to assist applicants and permitting authorities in using the top-down approach. In addition, some court cases and many administrative appeal

decisions further amplify and clarify the top-down approach. The "top-down" approach is only guidance and not mandated by the Clean Air Act.

The top-down approach was used to reanalyze the proposed BACT contained in the Department's preliminary decision. The top-down process consists of five steps.

In step 1, the applicant identifies all available control options for the source and the pollutant under consideration. This includes technologies used throughout the world. An available control option is a practical air pollution control technology or technique to the emission unit and pollutant under evaluation.

To assist in identifying available controls, Cominco and the Department reviewed the available controls listed on EPA's RACT/BACT/LAER (RBLC) Clearinghouse bulletin board where permitting agencies nationwide have listed the BACT control technologies imposed within the past five years.

In step 2, the applicant evaluates the technical feasibility of the various control options in relation to the specific source under consideration. If the applicant can clearly document and demonstrate, based on physical, chemical, and engineering principles, that technical difficulties would preclude the successful use of the control option, the option is eliminated from further consideration in this step.

In step 3, the remaining control options are listed in order of control effectiveness for the pollutant under review, with the most effective option at the top. In this step, the applicant also presents detailed information about the control efficiency, the expected emission rate, the expected emission reduction, and the cost, environmental, and energy impacts for each control option. An applicant proposing to use the most effective option is not required to provide the detailed information for the less effective options.

In step 4, the energy, environmental, and economic impacts are considered to arrive at the final level of control. The applicant is responsible for presenting an objective evaluation of both the beneficial and adverse energy, environmental, and economic impacts.

EPA's guidance describes the process for this step as follows: "If the applicant accepts the top alternative in the listing as BACT, the applicant proceeds to consider whether impacts of unregulated air pollutants or impacts on other media would justify selection of an alternative control option. If there are no outstanding issues regarding collateral environmental impacts, the analysis is ended and the results proposed as BACT. In the event that the top candidate is shown to be inappropriate, due to energy, environmental, or economic impacts, the rationale for this finding should be documented for the public record. Then the next most stringent in the listing becomes the new control candidate and is similarly evaluated. This process continues until the technology under consideration cannot be eliminated by any source-specific environmental, energy, or economic impacts which demonstrate that alternative to be inappropriate as BACT."

The process concludes in step 5, where the most effective control option not eliminated in Step 4 is proposed as BACT for the pollutant and source under review.

The applicant proposes to install and use Low NOx controls, which is not the most effective of the control options presented, and has put forth arguments to show that the more effective control options, catalytic reduction and water injection, are inappropriate as BACT due to environmental, energy, and economic impacts.

To assure a thorough and objective review of the applicant's arguments, the Department reviewed EPA memorandums, guidance, and administrative appeals to determine the appropriate standards for instances when an applicant attempts to demonstrate that more effective control technolo-

gies are not achievable due to adverse environmental, energy, and economic impacts.

When Congress created the BACT definition, they allowed the stringency of the BACT to be tempered by consideration of one or more collateral impacts – energy, environmental, or economic. This was intended to account for situations where the use of BACT in one area of the country was not applicable to another area of the country, due to differences in feedstock material, plant configuration, or other reasons.

EPA and the courts have interpreted the collateral impacts clause to serve as a safety valve, allowing a less stringent BACT whenever compelling and atypical energy, environmental, or economic circumstances specific to a facility constrain it from using of the most effective technology.

All BACT requirements, with limits, monitoring, record keeping, and reporting obligations are incorporated in Sections 4 and 5 of the permit. Table 4-1 below summarizes the BACT proposed by the Department.

Table 4-1 Department BACT Limits

Equipment	NOx	CO	PM-10	VOC
MG-17	121.3 lb/hr	N/A[1]	2.6 lb./hr, 20% opacity	
MG-11	0.031 lb/hp-hr	GOP[2]	20% opacity	
MG-12	0.031 lb/hp-hr	GOP		
MG-13	0.031 lb/hp-hr	GOP		
MC-1	N/A	N/A		
MG-14	0.031 lb/hp-hr	GOP		
MG-15	0.031 lb/hp-hr	GOP		
MG-16	0.031 lb/hp-hr	N/A		GOP
MH-1, MH-2, & MH-3	0.084 lb/MMBtu	GOP	20% opacity	
MH-4, & MH-5	GOP	GOP	20% opacity	
MH-6 through MH-36	GOP	GOP	20% opacity	
MH-37 through MH-48	GOP	N/A	20% opacity	
MI-3	GOP	N/A	0.086 gr/dscf 10% Visible Emissions	
MD-4	N/A	N/A	0.01gr/dscf, 20% Opacity	N/A

MD-6	N/A	N/A	0.01 gr/dscf, 7% Opacity	N/A
MF-3	N/A	N/A	10% Opacity	N/A
MT-1 & MT-2	N/A	N/A	N/A	Sub-part Kb[3]
MT-3	N/A	N/A	N/A	
MF-1	N/A	N/A	N/A	N/A
MF-5	N/A	N/A	Chemical Stabilization and Watering	N/A
MF-6	N/A	N/A	quarry-liquid application where practical, drilling liquid application	N/A
MF-7	N/A	N/A	Covering, revegetation, watering	N/A
MF-8 & 9	No Control	No Control	No Control	No Control
MF-10	N/A	N/A	N/A	N/A
MF-11	N/A	N/A	LL and OOO[3]	N/A
MF-12	N/A	N/A	OOO[3]	N/A

[1] N/A – Not Applicable

[2] GOP – Good Operation Practices

[3] Applicable portions of referenced NSPS Subparts

4.1 BACT DETERMINATION FOR NOx

This facility is currently permitted to emit greater than 250 tons per year of NOx, and is therefore classified as a PSD

Major facility under 18 AAC 50.300(c)(1). The proposed modification will increase allowable NOx emissions in excess of the 40 ton per year PSD applicability threshold specified in 18 AAC 50.300(h)(3)(b)(ii). Therefore, the Department will impose NOx BACT for the proposed NOx emission sources.

The Department evaluated several NOx control methods as BACT for the following sources: large diesel-fired engines, small diesel-fired engines, small heaters, and the modular waste incinerator. The specific options and evaluation results are summarized in Tables 4.1-1 to 4.1-4, and discussed in detail in this section.

Table 4.1-1 Summary of NOx BACT (Large Diesel-Fired IC Engines)

Available Controls	Technically Feasible	Economically Feasible	BACT
Selective Catalytic Reduction	Yes	No	No
Non-Selective Catalytic Reduction	No	N/A[1]	N/A
Direct Water Injection	Yes	No	No
Low NOx Modification	Yes	Yes	Yes
Fuel Injection Timing Retard	Yes	Yes	No
Operation per Design	Yes	Yes	No

[1] N/A - Not Applicable

Table 4.1-2 Summary of NOx BACT (Small Diesel-Fired IC Engines)

Available Controls	Technically Feasible	Economically Feasible	BACT
Selective Catalytic Reduction	No	N/A[1]	N/A
Non-Selective Catalytic Reduction	No	N/A	N/A
Direct Water Injection	No	N/A	N/A
Fuel Injection Timing Retard	Yes	No	No
Lean Burn Combustion	No	N/A	N/A
Turbocharger and After-cooler	Yes	Yes	No[2]
Operation per Design	Yes	Yes	Yes

[1] N/A – Not Applicable

[2] All of the engines are fitted with turbochargers as part of their design. Two of the engines, MG-14 and MG-15, are fitted with aftercoolers as part of their design. ADEC does not consider retrofitting the smaller engines with aftercoolers technically-feasible, due to their small size.

Table 4.1-3 Summary of NOx BACT (Small Heaters)

Available Controls	Technically Feasible	Economically Feasible	BACT
Low NOx Burner/Flue Gas Recircu-lation	Yes	No	No[1]
Staged Combustion Air	No	N/A[2]	N/A
Selective Catalytic Reduction	No	N/A	N/A
Operation Per Design	Yes	Yes	Yes[1]

[1] LNB/FGR is BACT for heaters MH-l, MH1-2 due to their larger size.

[2] N/A - Not Applicable

Table 4.1-4 Summary of NOx BACT (Incinerator MI-3)

Available Controls	Technically Feasible	Economically Feasible	BACT
Staged Air Combustion	Yes	Yes	Yes[2]
Selective Non-Catalytic Reduction	No	N/A[1]	N/A
Selective Catalytic Reduction	No	N/A	N/A
Operation Per Design	Yes	Yes	Yes[2]

[1] N/A – Not Applicable

[2] Staged air combustion is integral to the incinerators design.

4.1.1 Mechanisms of NOx Formation

Combustion is defined as the rapid chemical combination of oxygen with combustible elements of a fuel. Combustion produces heat that can be manipulated to generate power. Most fuels have three combustible elements: carbon, hydrogen, and sulfur, which unite with oxygen from atmospheric air to produce heat. Atmospheric air is a mixture that contains roughly 79% nitrogen and 21% oxygen by volume. Nitrogen present in the combustion process sometimes combines with oxygen, forming oxides of nitrogen.

There are several types of oxides of nitrogen formed during the combustion process, but only two types occur in significant quantities: nitric oxide--NO, and nitrogen dioxide--NO_2. In stationary source combustion, most of the NOx formed is nitric oxide (NO), which can oxidize in the atmosphere to form NO_2, a regulated air contaminant. At high temperatures, NO formation is favored almost exclusively

over NO_2 formation, and the rate of NO_2 dissociation to NO is favored by the mechanism:

$$NO_2 + O + \text{heat} \leftrightarrow NO + O_2$$

After the flue gas exits the stack, the entrained NO may be oxidized by atmospheric ozone to form NO_2. Other complex atmospheric reactions with NO and NO_2 can also occur.

There are three mechanisms for NOx formation during combustion of certain fossil fuels. These formation mechanisms are thermal, fuel-bound, and prompt NOx. A brief discussion of each mechanism follows.

Thermal NOx Formation

The predominant mechanism in combustion reactions is thermal fixation of the atmospheric nitrogen at elevated temperatures, usually greater than 2800°F, known as thermal NOx. Production of thermal NOx is an exponential function of the flame temperature, and a linear function of the time the hot gas mixture is at that flame temperature. This mechanism follows the Zeldovich reactions, with three predominant paths for NOx formation in combustion:

$$(1)\ N_2 + O \leftrightarrow NO + N$$

$$(2)\ N + O_2 \leftrightarrow NO + O$$

$$(3)\ N + OH \leftrightarrow NO + H$$

Note that reaction (1), which is highly temperature-dependent, provides the atomic nitrogen (N) necessary for reactions (2) and (3). Note further that the reverse reactions are not favored by the presence of molecular oxygen. Therefore, in the oxidizing environment that normally prevails downstream from the actual combustion zone due to the presence of excess combustion air, the NO that has been formed is essentially fixed.

Fuel-Bound NOx

Chemically-bound nitrogen in the fuel is known as fuel-bound nitrogen. The oxidation mechanism is dependent on fuel-bound nitrogen content, fuel properties, and the stoichiometric conditions present during combustion. The most significant factors attributing fuel-bound NOx formation are chemically fuel-bound nitrogen content, and the fuel-to-air ratio during the early stages of combustion when fuel-bound nitrogen is liberated from the fuel.

As the chemically-bound nitrogen in the fuel enters the flame zone, the fuel is burned into small reactive, nitrogenous organic molecules which react with oxygen to form NO. In a reduction environment where insufficient oxygen is present for complete combustion, such as the fuel-rich zone of combustion, the nitrogenous fuel fragments encounter and react with each other, and convert the fuel-bound nitrogen to molecular nitrogen (N_2).

Fuel-bound nitrogen can be a significant source of NOx emissions from fossil fuels such as residual oil and coal, but significantly less fuel-bound nitrogen is contained in natural gases. The Department typically uses the most conservative technique to estimate NOx emissions due to fuel-bound nitrogen--to assume that all nitrogen in the fuel is converted to NOx during combustion.

Prompt NOx

Prompt NOx is produced by the formation of an intermediary such as hydrogen cyanide (HCN), through the reaction of nitrogen radicals and hydrocarbons (HC),

$$NO + HC + H_2 \rightarrow HCN + H_2O$$

followed by the oxidation of the HCN to NO. The formation of prompt NOx has a weak temperature dependence and a short lifetime of several microseconds. It is only significant in very fuel-rich flames, which are inherently low NOx emitters.

4.1.2 NOx Control Methods

This section describes the control technologies that may be available to reduce NOx emissions from one or more of the source categories listed by the applicant. The Department's evaluation of the availability and effectiveness of these controls for each of the applicant's source categories is provided in Sections 4.1.3 through 4.1.5.

Selective Catalytic Reduction (SCR)

Selective Catalytic Reduction (SCR) is a potential emission control technology for turbines and other internal combustion sources. SCR systems use ammonia to selectively reduce NOx to N_2. This technology reduces both thermal and fuel-bound NO_2. SCR injects ammonia or urea into the exhaust before the exhaust enters a catalyst bed made with vanadium, titanium, or platinum. The reduction reaction occurs when the flue gas passes over the catalyst bed where the NO_x and ammonia combine to become nitrogen, oxygen, and water as follows:

$$4NO + 4NH_3 + O_2 \rightarrow 4N_2 + 6H_2O$$

$$2NO_2 + 4NH_3 + O_2 \rightarrow 3N_2 + 6H_2O$$

The required catalyst bed temperature is dependent on the type of catalyst used, and must be maintained within a narrow temperature range for effectiveness. Manufacturers tailor their catalyst design for the temperature range expected. A metal oxide catalyst, such as vanadium or titanium is effective between approximately 600 °F and 750 °F. For a wider temperature range, zeolite catalysts have been effective in the 800 °F to 1200 °F temperature range.

Temperature dramatically affects NOx reduction because the catalyst exhibits optimum performance within a narrow temperature range. Below this optimum range, the catalyst activity is greatly reduced, allowing unreacted ammonia to "slip" through. This slip results in increased ammonia concentration in the exhaust gas that is discharged into the

atmosphere. Above the range, ammonia begins to be oxidized to form additional NOx. Further excessive temperatures may damage the catalyst.

In addition to tight operating temperature controls, the SCR process requires good control and continual adjustment of the ammonia injection rate to match the rate of NOx formation. An ammonia deficiency causes nitric oxide to react preferentially with the excess oxygen, while an ammonia surplus leads to additional ammonia slip.

Exposing a catalyst to sulfur-bearing fuels and ammonia forms ammonia salts. These salts foul the surface of the catalyst, rendering it useless and causing premature replacement.

Sulfur-tolerant SCR catalysts are available, but are composed of vanadium pentoxide, a hazardous substance. These catalysts are still susceptible to some ammonium sulfate fouling. The spent vanadium pentoxide catalyst would have to be shipped off-site for disposal. To address this concern, many catalyst vendors operate exchange programs where spent catalysts are exchanged for new catalysts at a reduced price. Exchange programs alleviate customer waste disposal concerns and allow the vendor to recycle the precious metals that make up many of the catalysts.

In summary, successful operation of an SCR system occurs if the catalyst is exposed to an exhaust stream that is not an oxidizing environment. The injection of a reducing agent, most commonly ammonia (NH_3), causes NO to preferentially react with the agent to form nitrogen and water, rather than reacting with the excess oxygen. SCR requires a narrow temperature range to achieve optimum catalytic performance. SCR may be used in conjunction with reductions from steam or water injection, or combustion modifications.

Carefully designed SCR systems achieve NOx reduction efficiencies as high as 90%, with ammonia slip vendor guarantees of no greater than 10 ppm available. Conservative reductions are 80% control efficiency. The Department has no clear evidence that the technology would be problematic in Alaska.

Non-Selective Catalytic Reduction (NSCR)

Non-selective Catalytic Reduction (NSCR), sometimes called a three-way catalyst, reduces NOx emissions 80% to 90% at a temperature between 800 and 1200 degrees F. NSCR systems use a mixture of platinum and rhodium catalyst, and carbon monoxide and hydrocarbons (CH_4) as reducing agents contained in the flue gas, forming N_2, H_2O and carbon dioxide. The chemical reaction process is not fully understood, but can be represented in the following basic formulas:

$$CH_4 + 4NO_2 \rightarrow CO_2 + 4NO + 2H_2O$$

$$CH_4 + 2O_2 \rightarrow CO_2 + 2H_2O$$

$$CH_4 + 4NO_2 \rightarrow CO_2 + 2N_2 + 2H_2O$$

$$2CO + 2NO \rightarrow 2CO_2 + N_2$$

$$2H_2 + 2NO \rightarrow 2H_2O + N_2$$

NSCR is only effective in a fuel-rich, preferably gas-fired, non-variable load combustion. The air-to-fuel ratio must be at or close to stoichiometric to provide adequate concentration of reducing agents in the exhaust gas. Stoichiometric combustion produces exhaust gas nearly depleted of oxygen (less than four percent oxygen). The inability to control air-to-fuel ratio for varying loads limits NSCR application. NSCR is best known for its application in reducing NO_x from automobile exhaust. NSCR uses no reactant for the control of NOx.

Selective Non-Catalytic Reduction (SNCR)

Selective non-catalytic reduction (SNCR) is a thermal denitrification process that also involves the injection of ammonia or urea into the exhaust gases. The ammonia or urea reduces NOx to N_2 within a narrow temperature range of

1600 to 2000°F without a catalyst. At these temperatures, 80 to 90% NOx emission reduction can be achieved. Since the optimum reaction temperature is very high, the applicability of SNCR is primarily restricted to large industrial boilers.

As with SCR, SNCR requires transportation, handling, and storage of ammonia, a hazardous substance. There is a potential of ammonia slip in the exhaust gas, increasing ammonia levels in the ambient air. The other technical problem for most applications is the physical ammonia or urea injection location. For equipment operating at various loads, the proper injection temperature "window" physically moves within the combustion zone and the exhaust ductwork, requiring multiple injection locations.

Direct Water Injection/Low NOx Modification

Direct Water Injection lowers the peak flame temperature by providing a heat sink that absorbs some of the heat of the reaction, thereby reducing peak flame temperature and the resultant rate of NOx formation. The water injected into the engine is required to be extremely pure or the engine will require significant amounts of maintenance and repair. The manufacturer of Cominco's large diesel-fired engines, usually installs Direct Water Injection on engines with Low NOx modification packages. The Low NOx modification package is described below. Cominco has verified that a reverse osmosis water treatment and injection system would be necessary for this technology to be considered. A NOx reduction of 40% to 60% may be expected with this combined technology. Wartsila expects NOx emissions of approximately 6 grams per KW - hour with DWI controls installed on the 5000 kW generators. The manufacturer expects no additional fuel consumption when retrofitting the 5000 kW generators with both DWI and Low NOx Modification. If only DWI was retrofit, a 3% increase in fuel consumption is anticipated.

DRY CONTROLS

Dry controls incorporate an efficient combustion chamber design, staged combustion, and/or use of a lean fuel-to-air ratio. The use of lean fuel-to-air ratio results in lowered average combustion temperatures, reducing the formation of thermal NOx. Thermal NOx formation tends to be maximum at the high temperatures associated with stoichiometric conditions. Combustion chamber design changes may also reduce peak temperatures, thus limiting thermal NOx formation. The design techniques for this "dry low NOx" (DLN) combustion technology include staged combustion and/or use of a lean pre-mix combustion configuration. Specific examples are provided below.

Low NOx Modification

For the main generators, Wartsila has developed a retrofit package called a Low NOx Modification. This modification is based on a higher combustion air temperature at initiation of the injection cycle, which drastically reduces the ignition delay. The retrofit also retards the fuel injection start and has a shorter injection period that makes combustion take place at the optimal point with respect to efficiency. It improves fuel atomization, and modifies combustion space for improved mixing of air and fuel. The design requires replacement of the piston crowns, piston ring set, fuel injection valve, cylinder head, cylinder liner, and antipolishing ring. The Low NOx modification is expected to reduce NOx emissions approximately 30% from the Wartsila engines. The low NOx modification incorporates fuel injection timing retard as described below.

Fuel Injection Timing Retard

Fuel Injection Timing Retard (FITR) reduces NOx emissions in reciprocating engines by delaying the injection of fuel in the engine from when the chamber is at its smallest, to a time when the compression chamber is expanding. The larger

volume in the compression chamber produces a lower peak flame temperature, thus reducing thermal NOx formation.

FITR reduces the fuel efficiency of engines leading to a potential increase in SO_2 emissions. The extent of FITR is also limited because excessive injection delay can cause the engine to misfire. Emission reductions can range between 20% to 30% depending on the degree of FITR implemented.

Lean Pre-mix

Lean pre-mixed combustion technology can be used for heaters, boilers, and turbines. The air and fuel are pre-mixed before introduction into the combustion zone. This results in a mixture with a very lean and uniform air-to-fuel ratio. The lean fuel-to-air ratio results in lowered average combustion temperatures, reducing the formation of thermal NOx. The homogeneous mixture prevents formation of localized fuel-rich pockets within the combustion zone, which further reduces peak temperatures and lowers thermal NOx formation. To stabilize the flame and to assure complete combustion with minimum carbon monoxide emissions, a pilot flame may be incorporated in the combustor or burner design.

Lean pre-mixed combustors are not an effective control technique at reduced load conditions, because as the fuel requirement is decreased, the air and fuel mixture becomes too lean for proper combustion. To avoid these conditions, manufacturers' lean pre-mixed combustors switch to a conventional combustion mode at reduced-load conditions, which result in higher NOx emissions.

Staged Fuel

Staged fuel burner technology for heaters, boilers, and turbines, consists of two combustion zones. In the primary zone, a portion of the fuel is introduced to the combustion chamber with a fraction of the fuel characterized as a fuel-lean burn. The excess combustion air acts as a heat sink and results in sub-stoichiometric combustion conditions. The

remainder of the fuel is injected in the secondary zone and combusted. The technology reduces thermal NOx.

Overfire Air

Off-stoichiometric combustion, for heaters and boilers, includes the following control technologies: using of secondary air, burners-out-of-service, and biased burner firing.

The Overfire Air (OFA) technique generally is not available for boilers with capacities less than 25 MMBtu/hr. OFA is applicable only to boilers with special burner design.

Regarding the NOx removal efficiency of OFA, performance test data reported by EPA for three small gas-fired boilers, ranging in size from 22 to 56 MMBtu/hr, showed that controlled levels in the range of 0.073 to 0.142 lb/MMBtu were achieved, with emission reductions of 13% to 73% reported. Data for a 22 MMBtu/hr boiler burning distillate oil showed that emissions were reduced from an uncontrolled level of 0.154 lb/MMBtu to a controlled level of 0.125 lb/MTBtu, an emission reduction of 19 percent.

Flue Gas Recirculation (FGR)

Flue gas or exhaust gas recirculation is a proven control strategy for boilers and heaters. The basic principal of flue gas recirculation (FGR) is to replace a portion of the incoming combustion air with exhaust gas. FGR reduces NOx formation by reducing available oxygen content and by acting as a heat sink to lower peak combustion temperatures. At full-load, this results in a richer burn with more exhaust gas to absorb the heat of combustion, resulting in a lower combustion temperature. NOx removal of up to 40% is achievable by using a maximum recirculation of 30% exhaust gas. FGR with LNB can reduce NOx emissions up to 71%. FGR systems are commercially available, and are therefore technically feasible.

Recently, a new class of ultra-low NOx burners has been developed, which use a combination of techniques. The

burners are designed to recirculate hot oxygen-depleted gases into the combustion zone, thereby maintaining optimum flame temperature, yet reducing NOx by excess air controls.

Staged Combustion Air (SCA)

Another low NOx technology for boilers and heaters is a rich/quench/lean staged combustion design. Air and fuel are injected directly in the combustion zone to mix and combust simultaneously. The off-stoichiometric or staged combustion air method separates the combustion process into two stages: primary and secondary combustion. Primary combustion is the first stage of combustion conducted in a fuel-rich combustion zone. Combustion is then completed at lower temperatures in a secondary, fuel-lean zone.

The fuel-rich first stage inhibits the formation of thermal NOx due to low oxygen levels. Second stage combustion temperatures are below NOx formation temperatures due to the injection of excess air. This design controls both thermal and fuel NOx. Low NOx burners (LNB) achieve reductions in NOx emissions by using multiple combustion stages with varying fuel-air ratios to reduce combustion temperatures and thermal NOx formation.

Good Combustion Practice

Good combustion practice is applicable for all combustion sources. This method requires operating *and* maintaining the equipment according to the manufacturer's recommendations, operator experience, and good arctic engineering practices to obtain maximum fuel efficiency and minimum emissions.

4.1.3 NOx Control for Wartsila Generator MG Seventeen (MG-17)

Cominco plans to operate seven 5000 kW Wartsila generator sets (MG-1 through MG-6, and MG-17) for the Production Rate Increase Project. Wartsila engines MG-1 through MG-6 are existing 5000 kW units that the Department permitted

under PSD in 1988 with operational restrictions. Cominco is proposing to add a seventh 5000 kW Wartsila engine that must undergo BACT analysis as a new emission source.

When the Department issued the preliminary permit decision, the Department also reviewed BACT controls for MG-5. In subsequent negotiations, the Department, EPA and Cominco agreed to remove MG-5 from the BACT assessment. See Section 7 of this report.

Summary of Preliminary Decision and Public Comment

The applicant submitted an application for a construction permit to increase production at the Red Dog Mine. The production rate increase is subject to review under the prevention of significant deterioration (PSD) provisions of the state construction permit regulations, since it will cause significant emission increases in NOx. As a result, the applicant is required to show that BACT for NOx will be installed and used on each new or modified source.

As part of the production increase, the applicant proposed to increase electrical production at the Mine's power plant. In order to do this, the application called for the Department to remove an existing permit limitation that governed the operation of four diesel engines that make-up part of the power plant. This limitation currently restricts the combined operation of these four engines in a manner that would be equivalent to three engines operating full-load for the entire year. Through this permit action, the applicant desires to remove this limitation so the four engines can be operated full-load for the entire year.

In the matter of defining the modification, the applicant proposed that the emissions of three engines be limited according to the original 1988 permit, which allowed the operation of three engines full-load for the entire year. Also, the applicant proposed that the fourth engine, known as MG-5 and considered a standby engine in the 1988 permit, be considered a modified source in this permit action and be

subject to BACT for NOx. The Department concurred with this approach to defining the modification and the engine subject to BACT.

In March 1999, Department staff suggested that the SCR technology was feasible and that SCR may represent BACT for this project on MG-5[3]. In response to this proposed preliminary determination, the applicant proposed an alternate emission reduction strategy to serve as BACT. The applicant also amended the application to include the installation of an additional new engine, known as MG-17. This new engine would also be subject to BACT.

The applicant proposed to retrofit all of the existing, unmodified engines in the power plant with components that would reduce their NOx emissions, including MG-5. MG-17 would be supplied from the manufacturer with the NOx reducing components already installed. From the information presented, the retrofit appears to be equivalent to the manufacturer's most recent stock configuration of the 16V32 engine.

The Department proposed the alternate BACT in its preliminary decision, and argued that the aggregate emission reduction achieved at the power plant was nearly equivalent to the emission rate that could be achieved with SCR on only MG-5 and MG-17.

During the public comment period, the applicant, and the federal land manager objected to the alternate BACT proposal and the Department's judgement of it as meeting BACT. The applicant felt the Department did not use the appropriate standard of review and, if it had done so, would have rejected all control technologies except for the Low NOx package. The federal land manager also claimed the Department did not use the appropriate standard of review.

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[3] March 3, 1999 memo from John M. Stone, ADEC, to Tom Chapple, ADEC.

However, they claimed the Department should have found that catalytic control was BACT.

After the comment period closed, the department, the U.S. EPA, and the applicant entered into discussions concerning the BACT analysis for MG-5 and MG-17. As a result of these discussions, the applicant agreed to restrict the emission increases associated with MG-5 to avoid modification and BACT review.

NOx BACT Analysis for MG-17

The following presents the Department's final BACT review for MG-17 following the step-by-step top-down approach described previously.

Step 1 – Identify All Control Technologies

The sources under review are Wartsila 16V32 internal combustion, compression ignition, reciprocating engines. The engines burn diesel fuel and power 5,000 KW electric generators.

The applicant identified six control technologies for control of NOx that are applicable to the sources. The technologies are selective catalytic reduction, nonselective catalytic reduction, direct water injection, Low NOx components, Fuel Injection Timing Retard (FITR), Operation per design (no control).

In general, the Department concurs with the applicant's identification of available control technologies.

Step 2 – Eliminate the Technically Infeasible Options

The applicant eliminated from consideration non-selective catalytic reduction as being technically infeasible. In the preliminary decision, the Department concurred with the applicant that non-selective catalytic reduction is technically infeasible. This is because the oxygen content of the exhaust gas of the sources is too high.

The Department reviewed and affirms this finding.

Step 3 – Rank the Remaining Control Technologies by Control Effectiveness

By reviewing the application and numerous submittals, one can develop a ranking of the remaining control options by control effectiveness. The Department, in its preliminary decision, did not provide a ranking of the control options by control effectiveness. For purposes of the final evaluation, the technologies were grouped into three control options: catalytic reduction, direct water injection, and the manufacturer's stock engine configuration as of a certain date.

A ranking for the MG-17 by control effectiveness, expressed as percent reduction in NOx from the base case and emission in tons per year after application of the control option, is shown below. The base case of the new engine, MG-17, is the Low NOx configuration.

Control Option	Emission Rate (TPY)	Per Cent Reduction
	MG-17	MG-17
Catalytic Controls	53	90
Direct Water Injection	266	50
Low NOx configuration	531	0

The applicant provided detailed discussion of the economic, environmental, and energy impacts of each control option in the application and numerous addenda.

Step 4 – Evaluate the Most Effective Controls and Document Results

In the application and comments on the Department's preliminary decision, the applicant argued that catalytic controls and direct water injection were not achievable at the Red Dog Mine for energy, environmental, and economic reasons.

They concluded that an emission limit that could be achieved with the Low NOx configuration should be BACT.

In its preliminary decision, the Department argued that an emission rate roughly equivalent to that which could be achieved with catalytic control was BACT. The Department indicated the emission limit could be met by retrofitting all of the engines in the power plant to the 1999 engine configuration. In this way, the Department tempered the stringency of BACT by crediting the applicant with emission reductions from sources that were not part of the permit action. Also, the Department did not reject catalytic controls or direct water injection as BACT due to energy, environmental, or economic considerations.

The applicant, EPA, and the Federal Land Manager criticized the Department's preliminary decision. These parties took exception to the Department's approach in tempering the stringency of BACT by crediting the applicant with emission reductions at existing, unmodified sources. The land manager and the applicant also criticized the Department for not following the top-down approach, in that the Department did not determine that catalytic controls or direct water injection were not achievable at the Red Dog Mine.

The collateral impact clause of the BACT definition allows permitting authorities to temper the stringency of BACT in cases where the energy, environmental, economic impacts, or any combination of these factors that are associated with the use of a control option at a specific facility, are viewed by the review agency as sufficiently adverse as to render the use of that technology inappropriate for a given facility. In this case, the emission reductions achieved by the applicant's proposal to retrofit the existing, unmodified engines into a 1999 configuration is not a consideration of the BACT review provided for by the applicable law or guidelines. Therefore, the Department agrees this approach should not be used to temper the stringency of BACT.

COLLATERAL IMPACTS – CATALYTIC CONTROLS

The applicant believes that catalytic controls for BACT are inappropriate due to adverse environmental, energy, and economic impacts. A summary of the applicant's demonstration and the Department's review of this demonstration follows.

Environmental Impacts

With respect to environmental impacts, the applicant argues there is no environmental benefit from the use of catalytic controls over the least effective control option; no environmental risk to the public exists; and the use of ammonia in catalytic control presents small but serious risks to the workers and visitors.

The applicant also points-out that the emissions from the least effective control option will meet the PSD increments and the ambient air quality standards for NO_2. Further, the applicant states that the catalytic reduction option only achieves a marginal air quality benefit at the ambient air boundary compared to the least effective control option.

With respect to the collateral impact clause, the courts and EPA have determined that ambient air compliance and risk to the public from pollutants regulated under the Clean Air Act cannot be used to reduce the stringency of BACT (See *Columbia Gulf*, 2 E.A.D. at 827). Therefore, the applicant's arguments concerning ambient air benefits and concerns about risk to the public from regulated pollutants are not valid for tempering the stringency of BACT.

The use of ammonia and the risk to workers and visitors from ammonia use is a collateral impact of catalytic controls that can be considered when establishing BACT. Catalytic control requires the use of a reducing agent. There are three reducing agents in common use with catalytic controls: anhydrous ammonia, aqueous ammonia, and urea. The applicant presented two collateral impacts associated with the

reducing agents. The first is accidental release of the agent. The second is environmental impacts caused by excess agent in the exhaust gases of the engines. This second impact is commonly referred to as ammonia slip.

The Department examined the impacts due to ammonia slip. The catalytic control vendor guarantees an ammonia slip rate of 10-ppm or less for three years. Department staff examined the impacts based on an ammonia slip rate of 30-ppm, since it appears, based on the State of Hawaii's experience with catalytic controls on diesel engines, that 30-ppm allows the catalyst to be used for longer periods of time.[4]

Staff modeled the expected maximum ambient impacts caused by 30-ppm slip from two engines running full-load for the entire year and compared the impacts to the state ambient air quality standard for ammonia (human-health based), and to values expected to cause adverse vegetation impacts obtained from a literature search. The expected maximum impact is much less than the state standard, and an order of magnitude less that the lowest value expected to cause adverse vegetation impacts.

The Department also examined the effect of catalytic reduction on the engine exhaust and how this may impact workers and visitors. The modeled results indicate that the maximum ammonia slip rate in the stack is less the OSHA workplace limits. Staff also determined that NOx emissions present a greater impact from an industrial hygiene standpoint than ammonia slip. Therefore, it is likely that the NOx emission reductions resulting from catalytic reduction will improve workplace conditions.

Further, the Department examined the potential for adverse environmental impacts from accidental release of the ammonia reducing agent. To do this, we acquired and reviewed

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[4] August 3, 1999 memorandum from Bill Walker, ADEC, to John Stone, ADEC, Cominco Mine Ammonia Slip.

information from the Institute of Clean Air Companies (ICAC), a nonprofit trade association representing companies that supply air pollution monitoring and control systems, equipment, and services.

According to the ICAC, concern over the handling of ammonia centers on the transportation and storage of anhydrous ammonia under pressure. They believe ammonia use is safe and routine with proper controls, as demonstrated by the excellent overall safety record. The ICAC is unaware of any accidental releases of ammonia used in catalytic control applications that have caused a workplace injury. Gaseous ammonia is used at other facilities in Alaska, primarily as an industrial refrigeration agent. The potential for accidental release and exposure to workers or nearby residents is a risk that requires prudent management controls.

Furthermore, the ICAC says that many current applications of catalytic controls use aqueous ammonia or urea systems to avoid the risk of handling and the safety issues associated with the use of anhydrous ammonia.

The applicant analyzed a urea-based catalytic system as part of their application and concluded that a urea-based system was not achievable because urea has never been demonstrated at a remote site such as the Red Dog Mine. The applicant also contends that a failure of the urea handling and dissolving system could require the engines to be taken offline for extended periods of time due to a subsequent inability to comply with associated emission limits.

To examine this claim, we reviewed the catalytic control vendor's submittal concerning the urea-based system. The vendor, Siemens Westinghouse, specifically states that their proposal takes into consideration special requirements due to the remote location of the Red Dog Mine. The vendor's proposal and guarantee indicate that a urea-based system would be feasible at Red Dog's remote location.

Also, BACT, being a technology-based emission limit, qualifies for consideration under the affirmative defense provisions of Alaska Statute. The affirmative defense statute and regulations are available to the applicant in the event that noncompliance with the BACT limit is due to unavoidable emergency, malfunction, or non-routine repair.

In summary, there is not a compelling case, based upon the information reviewed supporting that ammonia-based or urea-based catalytic control should be rejected due alone to the probable adverse environmental impacts at the Red Dog Mine.

Energy Impacts

In the application and comments, the applicant presents an energy penalty associated with catalytic control and argues this penalty favors the rejection of catalytic control as BACT. It should be noted that this collateral impact only pertains to the modified engine, MG-5. This energy consideration does exist for the new unit, MG-17. Therefore, there are no energy considerations to reject catalytic controls as BACT.

Economic Impacts

In the preliminary decision, the Department recalculated and presented the costs associated with the catalytic control option. The Department did this because the Department disagreed with Cominco on what costs should be included in the economic analysis. As presented, the applicant's cost estimates for catalytic controls appeared to be greater than cost estimates for catalytic controls available to the Department from other sources.

The applicant commented that the Department's economic analysis was flawed. The applicant asserted the Department did not appropriately account for all of the valid costs associated with the loss of heat recovery on MG-5. As MG-5 is no longer subject to BACT, this is no longer an issue.

The Department estimates the capital cost to install catalytic controls on MG-17 at $2.9 million, with an annual operating cost of $635,000. This translates to a cost-effectiveness of $2,100 per ton of NOx removed.

As stated above, the applicant predicted the cost-effectiveness of SCR at approximately $5,600 per ton of NOx removed.[5] The Department and Cominco disagree on the cost estimate.

Despite the differences over cost, the applicant believes the Department should reject catalytic controls due to economic considerations. In the applicant's words the "costs are very significant, affecting Cominco's cost of production and competitiveness in world markets."

The applicant cites several instances where the top-down approach allows permitting authorities to reject a control option for cost considerations.

The first is when an applicant demonstrates, to the satisfaction of the permitting agency, that the costs of pollutant removal for the control alternative are disproportionately high compared to the cost of control in recent permit determinations.

The second is when the cost-effectiveness of a control option is outside the range of costs being borne by similar sources under recent BACT determinations.

The third is when an applicant can demonstrate that the cost of the control option will cause adverse economic impacts to the facility.

The applicant provided a print-out from EPA's RACT/BACT/LAER Clearinghouse database (RBLC) to show that

[5] Table A, Appendix A, February 1999 response to January 28, 1999 ADEC request for more information for Red Dog Mine, Hoefler Consulting Group.

catalytic controls have not been imposed on any similar sources in recent permit determinations. Furthermore, they state that catalytic control has been rejected in the most recent determination in California.

Surveying the RBLC has value; since, in theory, permitting authorities are required to input BACT determinations into the RBLC. However, it would be imprudent to rely completely upon the RBLC, since permitting authorities are recalcitrant in their responsibility of inputting BACT data.

In order to address the applicant's concerns, the Department staff obtained as much information as possible about costs of BACT for similar sources throughout the country. Staff also reviewed the information to see if there is a cost that is considered excessive for BACT.

Every BACT determination for a diesel-fired engine that is listed in the RBLC was reviewed by ADEC. The complete printout is available upon request.

There are no recent BACT determinations for diesel engines used as primary power generation in the RBLC. Moreover, there appear to be only 10 BACT determinations on diesel engines used for primary power generation since 1982. Of these, only one required catalytic controls. Cost data is available for two of the BACT determinations. The cost for both of these 1996 decisions was $432 per ton of NOx removed.

The Department also surveyed the RBLC for recent BACT determinations pertaining to metallic mineral mines. We found one. The facility contained a fuel oil-fired boiler that was required to install BACT at $5000 per ton of NOx removed.

The Department reviewed the Department's recent BACT decisions to determine the cost of NOx BACT. Costs range from $0 to $7,000 per ton of NOx removed. The four recent BACT determinations for diesel-electric generators used for

primary power production range from $0 to $936 per ton of NOx removed. It should be noted that catalytic controls were rejected in two of the decisions because the engines are standby units, although the units are allowed to operate on a part-time basis.

The Department contacted the Air Programs in EPA's Regional Offices to see how much NOx BACT costs in other states, and if there is a cost that is considered excessive for BACT. In general, the Department found there does not appear to be a uniform cost policy that is used throughout the country.

Finally, the Department attempted, but was unable, to determine how much the newer units at electric utilities in the United States pay for air pollution control per unit of power produced. This inquiry was based on the reasoning that the applicant's powerhouse is similar to an electric utility. If catalytic control costs for this permit action were substantially in excess of the amount that utilities are paying nationally for newer units, then the costs for these catalytic controls could be excessive.

Even without the national data, the Department looked at the cost of catalytic controls per unit of power produced for this permit action. If the Department assumes that the engine runs at 80% of full capacity, then approximately 35 million kilowatts of electrical power will be produced each year. The annualized cost of catalytic controls for this unit is approximately $1.0 million. This translates to a unit cost of 3¢ per kilowatt-hour.

If the applicant did not have a powerhouse, it would probably buy power from a rural Alaska utility. From a cursory review, it appears that the average cost of electricity in rural-Alaska is approximately 15¢ per kilowatt hour. Using this cost, catalytic controls would be equivalent to a 20% increase in the electric rate of the facility. In the Department's judgement, this is a disproportionate cost increase when viewed as an electric utility. Furthermore, the cost is significantly

higher on a cost-per-ton removal basis in comparison to the $0 to $936/ton of recent BACT decision [sic] for similar installations.

Another perhaps better way to determine if the cost of BACT is excessive, is for the applicant to present detailed financial information showing its effect on the operation. However, the applicant did not present this information. Therefore, no judgment can be made as to the impact of a $2.1 million control cost on the operation, profitability, and competitiveness of the Red Dog Mine.

The Cominco Red Dog Mine is located within the Northwest Arctic Borough, an area with historical high unemployment and limited permanent year-round job opportunities. During 1997 and 1998, the Borough's unemployment rate has been the highest in the State. The Red Dog Mine, a world-class lead and zinc operation, has a dramatic affect to reverse these historic trends for this region of the State. The Red Dog Mine is the largest private employer within the borough, and represents 14% of the borough's employment. The payroll of $26.4 million represents over a quarter of the borough's total wage and salary.[6]

Before the Mine opened in 1990, borough wages were well below state average wages, with consumer costs 40-45 percent higher than those of Anchorage. The Mine now provides high paying year round employment. Cominco's contributions to the local economy go beyond wages. Cominco's contractors, vendors, and wages have boosted the borough's private sector economy. Employment in the service sector grew by 46% from 1989 through 1992.[7]

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[6] Niel Fried and Brigitta Windisch-Cole, *A Profile: Northwest Arctic Borough*, Alaska Economic Trends, Volume 19, Number 1, January 1999.

[7] Stinson, Hollie, *Northwest Arctic Borough, A Trends Profile*, Alaska Economic Trends, October 1993.

Recent discoveries of additional ore reserves could extend Red Dog Mine's operations for an additional thirty years. With government support and endorsement of Cominco's operations, including the Production Rate Increase Project, the Red Dog Mine will continue to influence and benefit the residents and economy of this region.

The Red Dog Mine plays a unique and continuing impact on the economic diversity of this region. Therefore, the Department has chosen to consider the direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts for the foremost consideration to judge economic impacts of SCR. To support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region, the Department has rejected Selective Catalytic Reduction controls based on excessive economic cost—$2.9 million capital cost, with annualized costs approaching $635,000.

COLLATERAL IMPACTS – DIRECT WATER INJECTION

The applicant believes that direct water injection as BACT is inappropriate due to environmental and economic considerations. A summary of the applicant's demonstration and the Department's review follows.

Environmental Impacts

With respect to environmental impacts, the applicant argues that direct water injection is inappropriate because the amount of water needed for this control option may not be available at the facility. Further, the applicant argues that ice fog may be formed during the winter months leading to worker safety issues.

The lack of water is certainly a valid environmental consideration. However, the applicant did not present substantive factual information about the quantity of water needed for the

control option and its potential availability at the site. According to the applicant, the mine facility has difficulties in providing a high-quality drinking water supply. Without a substantiating analysis, the Department is unable to concur that the applicant has demonstrated that direct water injection is inappropriate due to a lack of water.

With respect to ice fog, the Department can easily address this concern by carefully writing the BACT limit such that direct water injection would not be required at times when ice fog is expected to cause safety problems at the facility. Such a provision would result in higher temporary emissions of NOx.

In summary, although there maybe some compelling water supply problems, there is not sufficient information available to the Department at this time to make a stand-alone decision that the collateral environmental impacts of the direct water injection control option would render it inappropriate as BACT at this facility.

Economic Impacts

The applicant estimates the cost-effectiveness of direct water injection at $6,000 per ton of NOx removed. Cominco argues the "cost is excessive, given that water injection has never been demonstrated in Arctic service, the actual costs associated with the first time retrofit and satisfactory operation of this technology at a remote northern Alaskan facility would undoubtedly be even higher than those shown above, fresh water is still an unresolved issue for the Mine, and should larger volumes of water than 0.5 pounds of water per pound of fuel burned be required the additional cost could be tremendous."

With regard to the questions about the feasibility of this technology in the arctic, the applicant should obtain documentation from the technology manufacturer. If the technology is inappropriate for use in Alaska because of site-specific

concerns, then the applicant should specifically state what the concerns are and why the technology is infeasible.

In order for a technology to be eliminated from consideration, the applicant must clearly document and demonstrate, based on physical, chemical, and engineering principles, that technical difficulties would preclude the successful use of the control option. The applicant has not provided sufficient and compelling information for the Department to reach such a conclusion.

With regard to the cost, it is likely that the cost of this control option is excessive for BACT, since the applicant estimates it is at least as costly as the catalytic control option.

To come to this conclusion, one must concur with the applicant's cost estimate. Yet, the Department disagrees with the applicant's cost estimates.

First, it has not been well established how much water this control option requires. This is important because there are two current sources of water at the facility. One source requires little or no treatment, with corresponding minimal expense. The other requires extensive treatment, with corresponding high expense. It appears the applicant estimated the control cost using the most expensive option. However, there is not enough information in the application to verify this option is actually necessary.

Next, the applicant estimated the operating costs of each direct water injection system at approximately $2,000,000 per year. These costs are not factually supported and at this time are not verifiable by Department staff. This is a significant item and amounts to approximately 80% of the control option cost.

Finally, the direct water injection from the engine manufacturer is estimated to cost $250,000 per engine. The applicant then estimates the capital cost to install this option and build the necessary equipment to supply water will cost approxi-

mately $1,250,000 per engine. Most of this cost is made-up of contingencies (40%) and multipliers.

Without further supporting documentation, the Department can only conclude that these costs are unusually high, and without further explanation, the Department cannot verify the estimates even if plausible reasons do exist to support such costs.

Having identified the Department's reservations regarding the estimates put forward by the applicant, the Department has not prepared an alternative cost estimate. Furthermore, the Department has no substantive data whereby costs would be substantively lower than the Department's calculated costs for SCR controls. Therefore, the Department concludes that economic cost of this technology would be at least comparable with that of SCR, and overall would constitute a disproportionate cost of controls.

BACT decision for Wartsila Generator Seventeen (MG-17)

In final permit negotiations with U.S. EPA and the applicant, the Department has imposed a cumulative NOx emission limit for Unit MG-5 to avoid BACT review under PSD. Therefore, the Department has imposed no BACT limit for MG-5 in the final permit decision.

The Department finds an emission rate achievable with Low NOx controls to be BACT on diesel generator MG-17. A vendor-guaranteed emission rate of 121.3 lb/hour is representative of the NOx reduction expected of the Low NOx controls selected as BACT. Section 4, Condition 20 requires unit MG-17 to meet an emission rate limit of 121.3 lb/hour representative of BACT. Condition 20 requires source testing within 180 days upon start-up for MG-17 to demonstrate compliance with the BACT requirement. Permit Section 9, Condition 40, requires reporting the source test results.

* * *

7. PERMIT ADMINISTRATION

The Department has prepared Air Quality Control Construction Permit 9932-AC005 for Cominco Alaska, Inc., to modify the Cominco Red Dog Mine Facility. The Permit authorizes Cominco to install and operate the proposed emission units, and relocate existing emission units to the Cominco Red Dog Mine Facility in accordance with 18 AAC 50.315 and AS 46.14.170.

In response to public comments and in order to comport with the Department's Operating Permit style, the Department revised the Final Draft Construction Permit for Cominco's Production Rate Increase project. The Department included twenty-one sections in this permit draft.

7.1 Permit Content

All facilities permitted under the Air Quality Control Rules are under the purview of the Department's Air Permits Program. The Program's Inspection Service Group has oversight for all reports, surveillance, records, and inspections of permitted facilities. Therefore, all plans, reports, and notices required under this Permit (No. 9932-AC005) should be submitted to the Group's Fairbanks Office, as provided for in Section 10, Condition 48, of the Construction Permit.

In accord with 18 AAC 50.320, the Department incorporated:

- The terms and Conditions of Cominco's previous Air Quality Permit Number 9332-AA003, except as revised or rescinded in this permit in Section 1, Condition 1.
- General Permit Conditions listed in 18 AAC 50.345(a) as Section 1, Conditions 2 through 8 of the Construction Permit.
- Section 2 includes conditions to restrict operations, emissions, and fuel properties during stages of the Production Rate Increase Project in order for the project to

comply with ambient standards and increments. The Department imposed emission limits in Section 2, Condition 14, to cap NOx emissions to no greater than 3,878 tons per year. This limit is necessary for the Red Dog Mine Facility activities to comply with the NO_2 increment.

- Section 3 incorporates owner-requested limits to avoid PSD review for carbon monoxide and sulfur dioxide, and to avoid particulate and NOx BACT review for MG-1 through MG-6.
- Sections 4 and 5 incorporate BACT emission limits, with monitoring, record keeping, and reporting requirements for NOx, PM, and volatile organic compounds.
- Sections 6 and 7 incorporate applicable federal emission standards by reference. The sections of the federal standards applicable for the project are included in Sections 16 through 21.
- Section 8 incorporates State emission standards for incinerators, fuel burning equipment, and industrial processes, open burning, and air pollution prohibitions. The Section also includes monitoring, record keeping, and reporting requirements for each section. Finally, the Section includes a permit term for good air pollution control practices.
- Section 9 lists general source testing and monitoring requirements for this permit.
- Monitoring, record keeping, and reporting obligations are listed in Section 10.
- Section 11 lists the source inventory for the Cominco Red Dog Mine Facility. This list includes permanent fuel burning equipment, incinerators, and industrial processes, with both point and fugitive sources of air contaminants.

- Section 12 contains the permit application documentation that Cominco has provided for the Production Rate Increase Project.
- Section 13 includes the visible emission surveillance procedures and forms for documenting surveillance of emission units at the Red Dog Mine.
- Section 14 includes an Excess Emission Notification Form for Cominco to report operations and emission deviations from the permit terms.
- The Department revised Cominco's Public Access Control Plan in order to make provisions practically enforceable. This revision, with sign posting requirements, is included in Section 15.

Based on a June 23, 1999 discussions with U.S. EPA Region X, the Department added the 1988 NOx BACT emission limits for Sources MG-1, and MG-3, through MG-5 in Permit Section 4, Condition 20. The Department concurred with EPA that the decision to issue Permit 9332-AA003 did not give due notice and public process for revising or rescinding the 1988 NOx BACT limit. Therefore, that 1994 permit decision appears to be in error. To correct that oversight, the Department reinstated the limits. For the 2259 ton per year NOx limit, the Department further adjusted the limit to a 12-month rolling total to ensure that the limit is practically enforceable under Federal guidelines. The Department has added emission monitoring and reporting for these two limits in Condition 20.

7.2 Owner requested Operation and Emission Limits

The Department has incorporated into the construction permit several owner-requested limits provided in the permit applications and supplements. These limits, their monitoring, record-keeping, and reporting obligations establish the basis to ensure the permittee modifies the facility as set out in the application documents. The Department also imposed a

cumulative NOx emission limit of 2259 tons per year for MG-1 and MG-3 through MG-5 in condition 18, to avoid U.S. EPA objection to the final permit decision. This cumulative limit represents the Department's 1988 PSD decision for power plant NOx emissions.

In the April application supplement, Cominco proposed to rebuild each of the existing six Wartsila 5 MW generators, MG-1 through MG-6, with low emission parts (Cominco 1999e). Units MG-1 and MG-3 through MG-5 will require camshaft replacement to complete the retrofit with low emission parts. Units MG-2 and MG-6 previously incorporated this portion of the low emission retrofit during the Department's 1994 PSD permit decision. Further, Cominco proposed to adjust the fuel-injection timing retard to ensure compliance with a 121.6 lb/hour NOx emission rate. The Department has not retained this owner-requested limit, but replaced it with an equivalent total NOx emission rate of 2259 tons per twelve-month period, in Condition 18.

* * *

New Unit SCR

Selective Catalytic Reduction Capital Costs (MG-17)
SCR/Urea
BASED ON THE APPLICANTS METHODS, WITH DEC MODIFICATIONS.

Purchased Equipment Costs

A.	Basic Equipment & Auxiliaries: Retrofit (Siemens Estimate)	$490,000
B.	Water Pretreatment System	$20,000
C.	Freight and Taxes (0.1x(A+B))	$51,000
D.	Total Equipment Cost (TEC)	$561,000

Construction Costs

E.	Foundations and Supports (0.08 x TEC)	$44,880
F.	Erection and Handling (0.14 x TEC)	$78,540
G.	Electrical (0.04 x TEX)	$22,440
H.	Piping (0.02 x TEC)	$11,220
I.	Insulation (0.01 x TEC)	$5,610
J.	Painting (0.01 x TEC)	$5,610
K.	Total Construction Costs	$168,300
L.	Total Direct Costs (TDC)	$729,300

Building Costs

M.	Red Dog Module Cost, 75ft x 30ft $ 500 per square foot	$1,125,000

INDIRECT COSTS

N.	Engineering and Supervision (0.3 x (TEC))	$168,300
O.	Construction and Field Expenses (0.05 x (TEC))	$28,050
P.	Construction Fee Multiple Contractors (0.20 x (TEC))	$112,200
Q.	Startup (0.02 x TEC)	$11,220
R.	Performance Test (0.01 x TEC)	$5,610
S.	Total Indirect Costs (TIC)	$325,380
T.	Remote Site Construction and Installation (0.4 x (see note below))	$83,252
U.	TOTAL DIRECT AND INDIRECT COSTS	$2,262,932
V.	Contingency (0.3 x (TOTAL DIRECT AND INDIRECT COSTS)	$678,880
W.	TOTAL INSTALLED CAPITAL COSTS (TCC)	$2,941,812

Selective Catalytic Reduction Annualized Costs
SCR/Urea; 10 yr Amortization

DIRECT COSTS

X.	Operating and Maintenance Labor (1 employee x $50/hr x 6 hrs/day x365 days/yr)	$109,500
Y.	Supervisory Labor (0.15 x OLM)	$16,425
Z.	Parts and Materials (0.1 x Basic Equipment + water treatment)	$51,000
AA.	Catalyst Replacement ($75,000 every three years @ 7%)	$28,579
BB.	Urea Usage ($0.08/lb at 145.5 lb/hr)+$0.05/lb freight)	$165,695
CC.	TOTAL DIRECT COSTS	$371,199

INDIRECT COSTS

DD.	Overhead (0.80 x total labor)	$100,740
EE.	Property Tax (0.01 x TCC)	$29,418
FF.	Insurance (0.01 x TCC)	$29,418
GG.	G and A Charges (0.02 x TCC)	$58,836
HH.	Capital Recovery (0.142 x TCC) 10 years at 7 percent	$417,737
II.	TOTAL INDIRECT COSTS	$636,150
JJ.	TOTAL ANNUALIZED COSTS	$1,007,349
KK.	TOTAL TONS PER YEAR NOx REMOVED	478
LL.	COST EFFECTIVENESS (per ton NOx removed)	$2,107

Note: this analysis is based on the analyses presented in Cominco's February 10, 1999 *Air Quality Control Construction Permit: Response to January 28, 1999 ADEC Request for More Information.*

The Remote Site Construction and Installation has been modified from Cominco's method. Expenses included are Foundation and Supports, Erection and Handling, Startup, Performance tests, and the portion of Engineering, Supervision due to installation at Red Dog.

Electrical changes from 0.2 to 0.04 per Vatavuk's *Estimating Costs of Air Pollution Control*, page 21. Piping changed from 0.2 to 0.02 per Vatavuk page 21.

Capital Recovery changed from 10% to 7% per EPA guidance.

Urea usage has been changed to 145.5 lb/hr based on the Siemens estimate of ammonia requirements found on page 11 of Appendix C of Cominco's *Air Quality Control Construction Permit: Response to January 28, 1999 ADEC Request for More Information.*

The cost of the water pretreatment system has been changed based on a 2/27/99 telephone conversation with *Culligan* a vendor of RO equipment.

The tons of NOx removed was calculated using a 90% reduction from a base case of 121.3 lb/hr for a stock engine outfitted with the standard Low NOx components.

Retrofit SCR

Selective Catalytic Reduction Capital Costs (MG-5)
SCR/Urea; Waste Heat Generator Relocated to MG-6
BASED ON THE APPLICANTS METHODS, WITH DEC MODIFICATIONS.

Purchased Equipment Costs

A.	Basic Equipment & Auxiliaries: Retrofit (Siemens Estimate)	$490,000
B.	Waste Heat Generator	$237,000
C.	Water Pretreatment System	$20,000
D.	Freight and Taxes (0.1x(A+B+C))	$74,700
E.	Total Equipment Cost (TEC)	$821,700

Construction Costs

F.	Foundations and Supports (0.08 x TEC)	$65,736
G.	Erection and Handling (0.14 x TEC)	$115,038
H.	Electrical (0.04 x TEX)	$32,868
I.	Piping (0.02 x TEC)	$16,434
J.	Insulation (0.01 x TEC)	$8,217
K.	Painting (0.01 x TEC)	$8,217
L.	Total Construction Costs	$246,510
M.	Total Direct Costs (TDC)	$1,068,210

Building Costs

N.	Red Dog Module Cost (RDM) 75ft x 30ft $ 500 per square foot	$1,125,000

INDIRECT COSTS

O.	Engineering and Supervision (0.3 x (TEC))	$246,510
P.	Construction and Field Expenses (0.05 x (TEC))	$41,085
Q.	Construction Fee Multiple Contractors (0.20 x (TEC))	$164,340
R.	Startup (0.02 x TEC)	$16,434
S.	Performance Test (0.01 x TEC)	$8,217
T.	Total Indirect Costs (TIC)	$476,586
U.	Remote Site Construction and Installation (0.4 x (see note below))	$121,940
V.	TOTAL DIRECT AND INDIRECT COSTS	$2,791,736
W.	Contingency (0.3 x (TOTAL DIRECT AND INDIRECT COSTS)	$837,521
X.	TOTAL INSTALLED CAPITAL COSTS (TCC)	$3,629,257

Selective Catalytic Reduction Annualized Costs
SCR/Urea; Waste Heat Generator Relocated to MG-6,
10 yr Amortization

DIRECT COSTS

Y.	Operating and Maintenance Labor (1 employee x $50/hr x 6 hrs/day x365 days/yr)	$109,500
Z.	Supervisory Labor (0.15 x OLM)	$16,425
AA.	Parts and Materials (0.1 x Basic Equipment + water treatment)	$51,000
BB.	Catalyst Replacement ($75,000 every three years)	$25,000
CC.	Urea Usage ($0.08/lb at 145.5 lb/hr)+$0.05/lb freight)	$165,695
DD.	TOTAL DIRECT COSTS	$367,620

INDIRECT COSTS

EE.	Overhead (0.80 x total labor)	$100,740
FF.	Property Tax (0.01 x TCC)	$36,293
GG.	Insurance (0.01 x TCC)	$36,293
HH.	G and A Charges (0.02 x TCC)	$72,585
II.	Capital Recovery (0.142 x TCC) 10 years at 7 percent	$515,355
JJ.	TOTAL INDIRECT COSTS	$761,265
KK.	TOTAL ANNUALIZED COSTS	$1,128,885
LL.	TOTAL TONS PER YEAR NOx REMOVED	478
MM.	COST EFFECTIVENESS (per ton NOx removed)	$2,361

Note: this analysis is based on the analyses presented in Cominco's February 10, 1999 *Air Quality Control Construction Permit: Response to January 28, 1999 ADEC Request for More Information*.

The Remote Site Construction and Installation has been modified from Cominco's method. Expenses included are Foundation and Supports, Erection and Handling, Startup, Performance tests, and the portion of Engineering, Supervision due to installation at Red Dog.

Electrical changes from 0.2 to 0.04 per Vatavuk's *Estimating Costs of Air Pollution Control*, page 21. Piping changed from 0.2 to 0.02 per Vatavuk page 21.

Capital Recovery changed from 10% to 7% per EPA guidance.

Urea usage has been changed to 145.5 lb/hr based on the Siemens estimate of ammonia requirements found on page 11 of Appendix C of Cominco's *Air Quality Control Construction Permit: Response to January 28, 1999 ADEC Request for More Information*.

The cost of the water pretreatment system has been changed based on a 2/27/99 telephone conversation with *Culligan* a vendor of RO equipment.

The tons of NOx removed was calculated using a 90% reduction from a base case of 121.3 lb/hr for an engine for an uncontrolled engine rebuilt with the standard Low NOx components.

The cost of rebuilding was not included as a rebuild was recommended by the vendor based on engine wear. Rebuilding using Low NOx parts has two justifications. Page 7 of the vendor data states that the Low NOx parts are 'today's standard.' Page 4 of the vendor data states that there is a 5% reduction in fuel consumption. The fuel savings offsets the costs of installing Low NOX parts. The Low NOX vendor data is found in Appendix F of Cominco's June 1998,

Application for an Air Quality Control Construction Permit: Production Rate Increase.

Production Loss and Backup Generator Rental Costs have been Eliminated due to the April 1, 1999 E-mail from Paul Dusenbury stating that the glycol loop allows each engine to be isolated for routine maintenance.

RESPONSE TO COMMENTS
COMINCO ALASKA
RED DOG MINE
PRODUCTION RATE INCREASE PROJECT
AIR QUALITY CONSTRUCTION PERMITS
No. 9932-AC005

On April 29, 1999, the Department of Environmental Conservation (Department) issued a public notice soliciting comments regarding the preliminary construction permit decision for Cominco Alaska's requested facility modification to their Red Dog Mine known as the Production Rate Increase Project (PRI). The PRI includes the removal of a power production cap, the installation of a new 5 MW generator, the operation of a new grinding circuit, plus the installation of other ancillary emission sources. In addition to the new equipment being installed, the PRI included many existing small sources that were not reviewed under the pre-construction review criteria of the Alaska Air Quality Control Prevention of Significant Deterioration Program.

The Department accepted comments on the preliminary decisions through the close of business on June 7, 1999. The Department received comments from the applicant, the U.S. Department of Interior National Park Service (NPS), Trustees for Alaska, Center for Science in Public Participation, Alaska Community Action on Toxics, Bob Robinson, and Ernest Dummann.

PERMIT COMMENTS

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B. Response to Comments, John Notar, U.S. National Park Service, June 4, 1999

1. General Best Available Control Technology (BACT)--Although it is unclear from the information available to us, it appears that the current PSD review is restricted to only the most recently proposed increase in production and equipment

being added. We believe that the emission units reviewed under PSD should be expanded and reviewed using current PSD policies and procedures. For example, Units MG-1, 3, 4, and 5 would be allowed to increase hours of operation (resulting in a significant emission increase) and a seventh generator added, only MG-5 and MG-17 were subject to BACT. As a consequence, Cominco used a trade to "net" out of BACT by agreeing to reduce emissions on MG-1, 3, and 4 (which should be subject to BACT) in return for higher emissions from MG-5 and 17.

The current PSD review is restricted to the Production Rate Increase equipment modifications and new equipment. In addition, Cominco identified that existing emission units are on-site at the Mine, not listed on the current permit, and not reviewed for BACT when installed. Cominco requested that the Department assess BACT for these unlisted emission units under the purview of this Construction Permit. Regarding the Department's proposal to increase the power production from Units MG-1, 3, and 4 without a BACT assessment, the Department has considered the history, intent, and purpose of the kW-hr operational limit[4]. Based on this consideration and discussions with the U.S. EPA and applicant, the Department is adding MG-5 to the "net," removing the operational limit, yet retaining the 1988 emission limit of 2259 tons of NOx per year which is the basis for the kW-hr limit. In addition, the Department has retained the 1988 NOx BACT limit of 750 ppmvd, corrected for 15% oxygen in the exhaust gas. Therefore, the Department has ensured that the four units in question are not modifications subject to BACT review under the Clean Air Act. The Department has re-assessed BACT for the MG-17 unit to dismiss the netting approach for BACT economic costs documented in the

[4] ADEC, August 13, 1999, memorandum, Cominco kW-hr Limit, Brian Renninger, author.

preliminary permit decision[5]. See Conditions 18 and 20 of the final permit decision.

2. EPA policy requires that an operation limit relaxation triggers review as if the units were new. We recommend that the entire Red Dog Facility be subject to PSD review to capture the complete impact of the facility and ensure that no emission unit has circumvented full PSD review through incremental increases in operation.

Response: The Department does not concur with the commentator that the entire Red Dog Mine Facility be subject to PSD review at this time. The Department initially permitted the Red Dog Mine Facility on June 17, 1988 under the State PSD program, approved by the U.S. Environmental Protection Agency (U.S. EPA). The Department reviewed Sources MG-1 through MG-5 for NOx BACT at that time. On July 27, 1994, the Department issued a final permit decision under the State PSD program to rebuild Source MG-2 and install Source MG-6. Since the facility and emission sources have not circumvented PSD review, the Department is therefore limiting its review to the production rate increase modifications. Requirements for BACT are as set out in 18 AAC 50.315(e)(3) for the State-approved PSD program, and 40 CFR 51.166(j)(3) for plan requirement elements necessary for U.S. EPA approval of the PSD program.

* * *

4. NOx BACT--ADEC correctly concluded that SCR represents BACT for the 5 MW generators. However, ADEC's decision that generators MG-3 and 4 were not subject to BACT allows a netting approach among several generators which is neither allowed by BACT, nor achieves the degree of reduction to result if all generators are subject to BACT

[5] ADEC, August 11, 1999 memorandum, Cominco Red Dog – Final Permit Action X065, BACT Analysis for NOx on MG-5 and MG-17, John Stone, author.

and equipped with SCR. Nitrogen oxide emissions could affect vegetation at Cape Krusenstern National Monument and Noatak National Preserve. Anthropogenic nitrogen can alter composition of plant communities, favoring those species most responsive to nitrogen inputs. Therefore, we encourage the Department to minimize NOx emissions from the project.

Response: The Department did not find that SCR represents BACT in the preliminary technical analysis report. The Department reassessed the netting approach in consideration of the National Park Service comment, and found that retrofit low NOx technology on all 7 engines does result in a greater degree of emission control from the Cominco Power Plant than applying SCR controls on 2 engines[6]. However, the Department in consideration of the comments from U.S. EPA, National Park Service and Cominco Alaska, Inc., has re-evaluated the BACT assessment to remove ambiguity regarding adequacy of the Department's BACT determination[7]. Please refer to section 4.1 of the Department's final Technical Analysis Report.

* * *

G. Response to Comments, Hoefler Consulting Group on behalf of Cominco Alaska, Inc., June 4, 1999

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9. Condition IV.B--MG-17 is scheduled for installation in the third quarter of 2000. The contract will be signed after this permit decision is issued. Retrofitting the existing six

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[6] ADEC, Cominco Red Dog Mine Power Plant NOx Emission Comparison PSD BACT Options, August 13, 1999, Jim Baumgartner, author.

[7] ADEC, August 11, 1999 memorandum, Cominco Red Dog – Final Permit Action X065, BACT Analysis for NOx on MG-5 and MG-17, John Stone, author.

Wartsila engines with low emission components requires that each engine be taken off-line for two weeks. Because of the down-time, the program can be completed more efficiently if each retrofit is scheduling during a regularly scheduled engine over-haul, or after MG-17 is installed.

Under this approach, two existing engines would be completely retrofitted in 1999. Retrofitting of the remaining four existing engines would be completed after installation of MG-17, but before the end of 2000.

Alternatively, the retrofit schedule can be accelerated five months if back-up Caterpillar generators MG-7 through MG-9 are operated during the retrofit periods instead of waiting for MG-17. The MG-7 through MG-9 sources are subject to an operating limit of 1,690,000 kW-hour/year. However, operating these generators to accelerate the retrofit schedule will reduce NOx emissions because the NOx emission reductions from the Wartsila engines occur sooner. The reduction is 56.5 and 13.7 TPY NOx for uncontrolled and FITR controlled Wartsila engines respectively.

Cominco requests replacement language for Condition IV.B to accommodate the retrofit.

> Re-cam and rebuild each of Wartsila sources MG-1 and MG-3 through MG-5 with low emission retrofit parts and rebuild each of Warstila sources MG-2 and MG-6 with low emission parts such that 2 engine rebuilds are completed before December 31, 1999 and 4 engine rebuilds are completed before December 31, 2000. Complete the installation of new Wartsila source MG-17 before December 31, 2000.
>
> As an option, re-cam and rebuild each of Wartsila sources MG-1 and MG-3 through MG-5 with low emission retrofit parts and rebuild each of Wartsila sources MG-2 and MG-6 with low emission retrofit parts such that all engine rebuilds are completed before July 31, 2000. The Caterpillar 3508TA supplemental power engines, sources

MG-7, MG-8 and MG-9 may each be operated for up to 218,400 kilowatt-hours during each Wartsila rebuilding period. Operating MG-7, MG-8 and MG-9 under this condition is in addition to the 1,690,000 kilowatt-hours per year allowed under Condition VI.A.9.

Response: In order to protect the NO_2 increment, the Department has capped the cumulative NOx emissions from Sources MG-1 through MG-6 and MG-17 in Condition 14 of the draft final permit at the 3,878 ton per year maximum NOx emission rate upon which Cominco modeled for these sources. The Department has added monitoring and reporting requirements to ensure the ton per year emission rate is enforceable. See Condition 14 of the final permit. Therefore, the Department has agreed to drop the requirement for Cominco to have the retrofit controls in place before Source MG-17 is installed. Please note that operational limits on MG-1, and MG-3 through MG-5 are retained until Cominco installs the Low NOx retrofit controls, as set out in Condition 18 of the final permit. For MG-5, this ensures that BACT controls are installed before the source is modified through removal of the operational limit.

* * *

44. Conditions XI.A.1.a(2), b(2), XI.B.1(d), and XI.C.2(a)-- Cominco requests that the conditions be deleted as $7,086 per ton removed is excessive. Cominco also believes that ADEC underestimated costs. The high cost per ton and small total amount of NOx reduction does not support concluding that low NOx burners and FGR are BACT for sources MH-1 through MH-3.

Response: ADEC's cost effectiveness assessment was based on Cominco's June 1988 application that gave 80% control efficiency for low NOx burners with flue gas recirculation (LNB/FGR). Cominco's October 1998 supplement corrected the expected control efficiency estimate to 50%. The reduction in control efficiency increases the cost control of LNB/FGR from $4,400/ton to $7,086/ton. While the cost of

control has increased, this type of control technology is still within the range considered feasible by the Department and the EPA on sources of this type.

Cominco has stated, without saying why, that even taking into account of the revised control efficiency that the $7,086/ton estimated costs are an underestimate. The Department described in the preliminary TAR the two changes made to Cominco's estimate. The Department changed the 70% contingency cost to 30% to maintain consistency with the contingency estimate of 30% that the Department has been allowing other applicants. The capital recovery factor was changed by the Department to reflect EPA's guidance in their January 26, 1999 letter to the Department. Other than those two changes, the analysis is Cominco's. Cominco's comments did not address why these two changes lead to an underestimation in costs. It should be noted that the Department's analysis retained several costs that Cominco included in their original estimate -- such as $18,150 for foundations and supports, erection and handling, electrical, piping, insulation, and painting. Cominco has provided no explanation of how these costs are pertinent to retrofitting a heater with LNB/FGR. The Department finds that the estimated costs of this technology to err on the side of being conservatively high.

The emission rate determined as BACT in Condition XI.A.1.b(2) has been modified to reflect the updated expected emission reduction. The updated NOx BACT emission rate for heaters MH-1, MH-2, and MH-3 is 0.084 lbs./MMBtu. See Section 4, Condition 20.5.

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TECHNICAL ANALYSIS REPORT

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C. Response to Comments, Hoefler Consulting Group on behalf of Cominco Alaska, Inc., June 4, 1999

* * *

3. Executive Summary, Finding 13--Cominco requests that Finding 13 be modified to fully and accurately characterize Cominco's proposal. Cominco also requested that Low NOx be installed on MG-1, MG-2, MG-3, MG-4 and MG-6 as BACT for those engines.

Response: The Department agrees to modify the finding to fully describe Cominco's proposal. Regarding Cominco's assertion that Low NOx be installed on MG-1 through MG-6 as BACT, the Department does not concur. BACT is applied to new and modified emission sources through pre-construction review under the pre-construction provisions of the Prevention of Significant Deterioration Program as delegated to the State of Alaska. Of the Wartsila generators at the Red Dog Mine, only unit MG-17 requires BACT as the result of the Production Increase Project. The Department has retained BACT emission limits imposed in 1988 for Units MG-1, MG-3, MG-4, and MG-5. The owner-requested limit of 2259 tons per year renders modification of these five sources as moot. The department has retained the 135 lb/hour NOx BACT limit for Sources MG-2 and MG-6a.

* * *

12. Section 4.1.3--ADEC has prepared a BACT analysis for NOx for the Wartsila engines at the mine for which the Department found Low NOx controls to be BACT on diesel generators MG-5 and MG-17. Cominco agrees, and requests that the Department find low NOx controls as BACT for MG-1 through MG-4 and MG-6 as well.

Response: The Department questions whether it has authority to impose BACT on unmodified emission units. The Department concurs that Low NOx emissions are warranted on MG-1-MG6 to protect ambient air quality, to meet the 750 ppmv 1988 NOx BACT limit for MG-1, MG-3, and MG-4, and meet the 135 lb/hour 1994 NOx BACT limit for MG-2 and MG-6. Although the Department concurs that the 121.3 lb/hour owner-requested limit for MG-2 and MG-6 renders moot the 1994 NOx BACT limit of 135 lb/hour, the Department has not imposed this limit on MG-2 and MG-6.

Cominco believes that SCR is not BACT for the generators at the Red Dog Mine. The statutory and regulatory factors that must be weighed in selecting BACT are environmental, energy and economic considerations. A reasonable and fair weighing of these factors demonstrate that SCR is not BACT and that Low NOx is BACT.

That SCR is not BACT is proven by the fact that ADEC itself has not found SCR to be BACT for several recent BACT determinations in Unalaska, St. Paul and Ketchikan. For Ketchikan, SCR was not required even though the emission[s] occur in a populated area, the emissions have far greater environmental impacts, the emissions did not result in energy penalties, and SCR was far less costly.

ADEC is not alone in never having required SCR as BACT for such engines. Neither EPA nor any state has required SCR as BACT on such engines. In short, the overwhelming authority throughout the nation and Alaska is that SCR is not BACT for such engines. ADEC would be extremely arbitrary to consider SCR as BACT at the Red Dog Mine circumstances where a weighing of factors even more clearly leads to rejection of SCR as BACT.

Response: The cited examples of engines permitted in Alaska without requiring SCR are not valid examples as they either took place over 18 months ago or were not used for similar

purposes[28]. The Department has permitted projects requiring SCR. The Kensington Gold Project and University of Alaska Fairbanks avoided PSD major classification by proposing to install SCR on their Wartsila engines[29].

The Department disagrees that no state has required SCR as BACT on diesel fired engines. The Department found in the RACT/BACT/LAER Clearinghouse, decisions mandating SCR on diesel engines in four states, some as early as 1989[30].

The Department agrees that the statutory and regulatory factors that must be weighed in selecting BACT are environmental, energy and economic considerations. The Department has revised the final Technical Analysis Report in consideration of the commentator's issue.

While Cominco agrees with ADEC's conclusion that low NOx is BACT, Cominco believes that the analysis is incomplete and faulty in numerous legal, factual, and technical respects that should be remedied in reaching a final decision. In these comments, Cominco will discuss the defects in the analysis to provide the necessary support for the decision that low NOx is BACT for the engines.

The analysis purports to apply EPA's "top-down" approach to BACT analysis. ADEC summarizes as starting with the technology ranked as the most effective control for the pollutant and considering other technologies ranked according to their control effectiveness. The analysis says on Page 27, that if the top ranked is shown to be "inappropriate through economic, environmental, or energy impacts, then it is eliminated...."

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[28] ADEC, August 10, 1999, memorandum, Cominco NOx BACT, Brian Renninger, author, attachment A, pages 11 and 12.

[29] Ibid. attachment A, page 15.

[30] Ibid. attachment A, pages 15 and 16.

The analysis in the TAR only considers SCR. With respect to SCR, the analysis does not consider environmental or energy factors, but only technical and economic feasibility. Thus on its face, the analysis is inadequate, even for SCR. However, ADEC does not eliminate SCR based on a weighing of the considerations as "top-down" methodology would require before moving on to consider low NOx, but instead simply finds that SCR is feasible. The analysis then compares the emission reduction obtained from installing low NOx on seven engines to the NOx emission reduction obtained from installing SCR on two engines, finding that the small amount of additional emission reduction obtained from SCR would be exorbitant.

Federal and State law require that a BACT analysis consider and weigh "energy, environmental, and economic and other costs... The BACT analysis is contained at pages 38 through 44 of the preliminary TAR. The headings are "Selective Catalytic Reduction," "Technical Feasibility," "Economic Feasibility," and "BACT decision" for Wartsila Generator Five (MG-5) and Seventeen (MG-17)." No heading exists for and virtually no weighing is provided of the environmental or economic impacts of SCR. Further, no consideration is given to significant, determinative technical faets bearing on technical and economic feasibility, such as the inability to move the waste heat generator currently on MG-5. No heading exists for "Low NOx," much less an analysis of relative impacts, even though Low NOx is selected as BACT.

Cominco has been required to submit extensive information on SCR and Low NOx and has done so in numerous responses to ADEC requests for information and presentations to ADEC. Little of that information has been considered in the preliminary TAR or rationale for the decision. That information is summarized in the BACT section of Cominco's *Presentation To Alaska Department of Environmental Conservation of Major Discretionary Air Quality Issues*

Pending Decision At Cominco's Red Dog Mine dated March 3, 1999, Attachment A.

Cominco submits that the final TAR should be amended to include the required consideration and weighing of the statutory and regulatory factors not yet considered in the TAR in arriving at the decision that Low NOx is BACT for MG-5 and MG-17. The following is the consideration Cominco believes is appropriate and supported by Cominco's prior submissions to ADEC.

Response: The preliminary TAR did perform a 'Top-Down' analysis of SCR.. The analysis in the preliminary TAR evaluated the energy, environmental, and economic criteria raised by Cominco within the Technical Feasibility and Economic Feasibility sections on pages 39 and 40. 'Top-Down' analysis does not require that each technology be compared but that the technologies stand or fall on their own merit. Since the preliminary TAR found SCR as both economic and technically feasible, the consideration of lesser controls was not required. The Department did not impose the technology indicated by the 'Top Down' analysis included in the TAR but, as stated on page 42 of the preliminary TAR, an alternative proposal presented by Cominco. While Cominco comments that the Department did not perform a 'Top-Down' Analysis and references the March 3, document found in Attachment A of Cominco's comments, that document is also not a 'Top Down' analysis. The Department has prepared a detailed response to the analysis included in Attachment A of Cominco's comments[31].

The Department has prepared a new 'Top-Down' BACT analysis that supplants the analysis found in the preliminary

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[31] ADEC, August 10, 1999, memorandum, Cominco NOx BACT, Brian Renninger, author.

TAR.[32] *This analysis includes a Top-Down BACT analysis taking into account the environmental, energy, and economic impacts to accommodate Cominco's comments.*

13. BACT--Environmental Impacts of SCR and low NOx.

SCR and low NOx both prevent significant deterioration by only allowing emissions that cause modeled ambient impacts that are within the NO_2 increment limit. An insignificant difference of 1.6 micrograms per cubic meter exists between the impacts from MG-5 and MG-17 equipped with SCR (22.7 ug/m3) versus Low NOx (24.3 ug/m3).

The total impact of the two engines equipped with either SCR or Low NOx produces a maximum modeled ambient impact one-third of the NO_2 primary and secondary standards selected to protect public health with an adequate margin of safety, and welfare.

Response: The Department has reason to expect that uncontrolled operation of Red Dog sources MG-1 through MG-6 would lead to NOx emissions exceeding the maximum allowable concentration increase allowed under 18 AAC 50.020(b)(2)[33]*. Cominco has voluntarily offered to retrofit sources MG-1 through MG-6 with Low NOx components. With this voluntary action, Cominco has submitted an analysis that shows that the maximum allowable NOx increase detailed in 18 AAC 50.020(b)(2) will not be exceeded.*

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[32] ADEC, August 11, 1999, memorandum, Cominco Red Dog – Final Permit Action X065, BACT Analysis for NOx on MG-5 and MG-17, John Stone, author.

[33] ADEC, August 12, 1999, memorandum, Owner-requested Limits and Ambient Impacts for Specified Stack Parameters, Jeff Anderson, author.

No public presence or residence exists within tens of miles of the mine. The nearest public use is a winter trail crossing many miles distant from the mine. As a result, no significant or real world public exposure exists.

Response: The Department's air quality control oversight extends beyond public exposure. The Department retains a role to protect the environment, as expressed as air quality-related values. Section 1 of AS 46.14 states the policy and purposes of the Air Quality Control Program as follows. "It is the policy of the state to have a program to prevent, abate, control, and identify air pollution that complies with 42 U.S.C. 7401-7671q (Clean Air Act), as amended, and federal regulations adopted under those laws."

SCR requires use of ammonia. The risk of ammonia release and worker exposure will exist from the use of SCR at the mine. The AQM Section has not evaluated this risk. Ammonia can cause serious injury or death. At the mine, an ammonia release could require evacuation of the mine, including residential quarters under severe arctic conditions. No alternative shelter is available at or near the site. Off-site evacuation could be hampered or impossible because of airport closure due to bad weather. The risk is enhanced because medical resources at the site are limited. These risks are not present with the use of Low NOx.

Response: The Department has modeled the ammonia slip from the proposed SCR units at 30 ppm, three times the vendor guaranteed emission concentration. Based on the modeling results the Department found that there should be no effects on human or vegetation health due to the ammonia slip from two SCR units at the Red Dog mine[34]*. The Department investigated the hazard due to accidental ammonia release due to implementation of SCR at the Red Dog mine.*

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[34] ADEC, August 3, 1999, memorandum, Cominco Mine Ammonia Slip, Bill Walker, author, pages 1 & 2.

The Department found no record of injuries or deaths due to implementing SCR in numerous installations throughout the US and the World. In addition the Department found that the use of a urea based SCR system eliminates the use of anhydrous ammonia, and minimizes the amount of aqueous ammonia used thereby minimizing the risk to the public and Cominco employees[35]*.*

Low NOx is a preferable technology based on environmental factors alone because:

- No significant environmental impacts exist from the virtually identical low levels of NO_2 ambient impacts from engines equipped with either SCR and Low NOx,
- No environmental risk to the public exists, and
- SCR presents small, but serious risks to Cominco workers and visitors from ammonia release and exposure.

Response: The Department disagrees that SCR and Low NOx as BACT result in virtual identical low levels of NO_2 impacts. In order for 'virtually identical' impacts to occur, the existing Wartsila engines would also need to be retrofitted with low NOx components. Cominco has voluntarily offered to retrofit all their existing Wartsila engines with Low NOx components.

That no environmental risk to the public exists is immaterial. Projects must always comply with health and welfare standards before a permit is issued[36]*.*

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[35] ADEC, August 10, 1999, memorandum, Cominco NOx BACT, Brian Renninger, author, Appendix A, pages 5-8, Items V.B1 through V.C.

[36] ADEC, August 10, 1999, memorandum, Cominco NOx BACT, Brian Renninger, author, Appendix A, page 5, Item V.A.4.

As mentioned above, the Department reviewed the hazard to workers and visitors due to potential ammonia releases from implementing SCR and we agree with Cominco that the risk is small.

14. BACT Energy impacts--The AQM Section does not take into account the energy impact of SCR. If SCR were installed on MG-5, the waste heat recovery unit could no longer be used to provide heat. Cominco evaluated the possibility and feasibility to move this waste heat unit to another engine. These conclusions were reported to the section which has not questioned the conclusions in the TAR or elsewhere. That evaluation concluded that the relocating the unit is not possible. The result of the loss of heat recovery from MG-5 due to installation of SCR would be installation of a diesel-fired boiler. Cominco would be required to burn up to 531,730 gallons per year of fuel oil to replace the waste heat. Cominco would need to haul the fuel from Red Dog Port by truck, creating additional emissions that would not be released if low NOx were selected.

Because of the substantial energy consumption required due to SCR, low NOx is preferred with respect to energy considerations, even without considering the additional emissions due to burning the additional fuel oil. The later factor provides an additional environmental consideration favoring selection of low NOx over SCR.

Response: The Department concurs that there are energy impacts due to SCR. However, these impacts appear to only for retrofitting MG-5 not the new engine[37]*. The revised NOx BACT in the final TAR addresses the energy impacts due to implementing SCR. Please see section 4.1.3 of the final TAR.*

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[37] ADEC, August 11, 1999, memorandum, Cominco Red Dog – Final Permit Action X065, BACT Analysis for NOx on MG-5 and MG-17, John Stone, author, Attachment 3, page 4 and 5.

15. BACT Economic Considerations--The AQM Section has provided an analysis that compares the cost of SCR and Low NOx. However, that analysis is flawed because the SCR costs of $1,586 per ton NOx removed is for a scenario that is not technically feasible and because the SCR cost does not include the cost of replacing waste heat and other valid costs.

Response: The Department is puzzled by Cominco's assertion. The Department's analysis followed Cominco's assumption for economic costs of an ammonia-based SCR option presented in a January 1999 application supplement.

As noted above, the design of the power house precludes the relocation of the MG-5 waste heat recovery unit. The reasons were provided in Cominco's *Response to January 28, 1999 ADEC Request for More Information*, submitted to ADEC on February 10, 1999. Because the relocation is not possible, the cost of providing the energy from a supplemental heater must be included in the economic analysis. The cost is not included.

Cominco notes that the AQM Section eliminated the cost of production loss and back-up generator rental estimates as unnecessary. This is based upon Cominco's ability to isolate the engine heat recovery units from the glycol loop. However, the complete shut-down of the glycol loop (and the entire power house) would be necessary to install the new supplemental heat generator onto the glycol loop, and is not associated with the existing Wartsila engines. Because a new unit would be installed, the loop must be shutdown until the new isolation equipment associated with the new supplemental heat generator could be installed. The production loss and generator rental estimates are included in the BACT analysis to reflect this cost.

Response: This is no longer an issue since MG-5 is not subject to BACT.

If these costs are included in the analysis, and the other inappropriate adjustments that the Section made to Cominco's analysis are disregarded, the SCR cost per ton of NOx removed is $5,643 using an aqueous ammonia system.

Even without considering the substantial additional costs of heat replacement, the analysis shows that total installed capital cost of SCR is nearly 10 times that for Low NOx, and that the total annualized costs of SCR are more than 12 times the total annualized cost for Low NOx. This understated economic analysis still shows an additional cost per year of over $1,000,000 for SCR than for low NOx. With an expected mine life of at least 40 more years, these costs are very significant, affecting Cominco's cost of production and competitiveness in world markets.

The authority and decisions that define the procedure to weigh economic considerations is outlined on pages 17 and 18 of Appendix A, Comments. EPA's Draft New Source Review Manual (1990) Page 45 states that in order to justify rejection of an alternative such as SCR:

> ...the applicant should demonstrate to the satisfaction of the permitting agency that costs of pollutant removal (e.g., dollars per total ton removed) for the control alternative are disproportionately high when compared to the cost of control for the pollutant in recent determinations."

EPA's Environmental Appeals Board outlined a similar test, specifically the range of costs borne by similar source under recent BACT determinations:

> We accept that cost-effectiveness is determined in most cases by showing that a control option or combination of options is either within or outside the range of costs being borne by similar sources under recent BACT determinations.

In Re Interpower of New York, Inc., PSD Appeals Nos. 92-8, 92-9 (March 6, 1994, Page 23).

According to EPA's Top-Down Guidance, at Page 34:

> ...Absent overriding environmental impact concerns or other considerations, an acceptable demonstration of adverse economic impact can be [an] adequate basis for eliminating [a] control alternative.

Applying these authorities requires ADEC to consider whether the costs that SCR would impose on Cominco at Red Dog are disproportionately high when compared to those being borne by similar sources in recent determinations. For the purposes of providing that information to ADEC, Cominco reviewed and compiled all of the BACT determinations for similar sources. (See figure 8, Appendix A) That compilation demonstrates that SCR, whose costs are disproportionate by an order of magnitude to Low NOx, has not been imposed as BACT on any similar sources in recent determinations. In fact, SCR has been rejected in the most recent such determinations in California. Clearly, SCR should be rejected on economic considerations alone.

Cominco believes the economic considerations clearly favor Low NOx, which has a cost that is a small fraction of the cost of SCR.

Response: The Department has revised the BACT analysis in the final TAR. Please see section 4.1.3 of the final TAR. The Department's revised BACT analysis determined that the economic costs of SCR are excessive for Cominco[38].

16. BACT Final Decision--As Cominco has stressed through-out the permit proceeding, ADEC is required to weigh the three statutory factors in reaching a BACT determination. EPA concurs.

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[38] ADEC, August 11, 1999, memorandum, Cominco Red Dog – Final Permit Action X065, BACT Analysis for NOx on MG-5 and MG-17, John Stone, author, Attachment 3, pages 5 through 8.

Response: The Department conferred with Ray Nye of EPA Region X to discuss the strategy presented in the preliminary permit decision. At that time, EPA had no objections to the approach for the preliminary decision. EPA provided no comments regarding the preliminary decision during the public comment period for the Red Dog Mine Production Rate Increase Project. The Department acknowledges that after the close of the public notice, Ray Nye informed the National Park Service (NPS) and Department Staff that EPA would defend NPS's challenge on the "emission bubble" approach. The approach was set out in the preliminary permit decision by which the Department credited emission reductions from unmodified Wartsila Engines to compare control costs options of SCR versus low NOx configurations.

Ignoring environmental and energy impacts in determining BACT is an ADEC failure to exercise the informed discretion required by statute and regulation. Ignoring these impacts is turning a blind eye to the most important factors that should be weighed in the BACT decision.

Cominco has provided a matrix analysis that weighs all the major relevant factors that might be considered in ADEC's BACT decision. These factors include the technology's control efficiency, NOx emission reduction, ambient air quality compliance, PSD increment consumption compliance, additional energy consumption, additional environmental impact, safety, and the technology demonstration status. This matrix demonstrates that Low NOx and FITR rank first and should be determined to be BACT.

Response: The Department disagrees that environmental and energy impacts were ignored in the preliminary TAR. Pages 39 and 40 of the preliminary TAR address the environmental and energy impacts raised by Cominco in their application.

The revised BACT analysis further addresses the environmental and energy impacts of SCR. Please see section 4.1.3 of the final TAR.

Cominco believes that if energy, environment, and economic considerations are weighed together in accordance with regulations, statutes, and EPA guidance, SCR must be rejected and Low NOx must be selected as BACT for the Wartsila engines at the mine. The ambient NO_2 impact is virtually identical, while SCR presents the additional environmental risk of ammonia release and exposure, as well as causing additional emissions from truck haulage of diesel and ammonia or urea. The necessary addition of a supplemental heat boiler to replace the lost waste heat recovery on MG-5 if SCR is installed would exact an annual energy penalty of more than half a million gallons of diesel fuel. Based on adverse environmental and energy considerations alone, Low NOx should be selected as BACT. These considerations, under EPA guidance cited above, might cause rejection of a technology such as SCR, even if the costs were less than Low NOx costs. Economic considerations, however, when combined with environmental and energy considerations clearly favor rejection of SCR and selection of Low NOx as BACT for the Wartsila engines. Not only is SCR disproportionately costly when compared to Low NOx, but SCR produces no additional air quality benefit while creating additional environmental risks and imposing a significant energy penalty.

Response: The Department has reassessed BACT. See Section 4.1.3 of the final TAR. Upon further consideration of economic impacts, the Department determined the implementing SCR is 'probably excessive'[39].

Cominco believes that ADEC's decision to reject SCR and select Low NOx should be consistent with other BACT

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[39] ADEC, August 11, 1999, memorandum, Cominco Red Dog – Final Permit Action X065, BACT Analysis for NOx on MG-5 and MG-17, John Stone, author, page 2.

decisions nationwide and in Alaska. Because SCR has not been required as BACT on similar sources, ADEC would be arbitrary to do so for the PRI Project.

Response: The Department rejected SCR in the preliminary and final permit decisions. See section 4.1.3 of the final TAR.

* * *

19. Conclusions--The AQM Section's statement in the conclusions regarding Cominco's undertaking is in error and should be corrected. As set forth at length above, Low NOx is clearly BACT for MG-5 and MG-17. Low NOx on the other Wartsila engines is not a substitute, necessary amendment, or part of the BACT for MG-5 or MG-17, but a separate voluntary undertaking by Cominco, which Cominco has asked be made enforceable as BACT.

Response: BACT is a process through which the Best Available Control Technology for a particular emission source is made. We agree that Low NOx on the Wartsila engines other than MG-17 is not BACT. We maintain that retrofitting MG-1 through MG-6 with Low NOx components is necessary to protect the NOx PSD increment. The Department has re-evaluated NOx BACT for the Wartsila engine MG-17 in accordance with the "top-down" approach. The Department concurs that low NOx emission configuration is BACT for the modified Wartsila Engine. See Section 4.1.3 of the final TAR.

* * *

STATE OF ALASKA
DEPT. OF ENVIRONMENTAL CONSERVATION
OFFICE OF THE COMMISSIONER

January 5, 2000

Chuck Clarke
Chuck Findley
EPA, Region X
1200 Sixth Ave.
Seattle, WA 98101

Dear Mr. Clark and Mr. Findley,

I have reviewed your letter and Order dated December 10, 1999, prohibiting Alaska from issuing a Prevention of Significant Deterioration (PSD) permit for a new diesel engine to generate electricity at the Red Dog Mine without first obtaining EPA's written concurrence on Alaska Department of Environmental Conservation's (ADEC) determination of Best Available Control Technology (BACT) for that engine. After review and consideration of the applicable federal law, I believe that the Order is not a valid or proper exercise of EPA's authority. Further, I believe that ADEC's BACT determination is consistent with the Clean Air Act (CAA) and with state law.

The Order has significant adverse impacts on the people of the Northwest Arctic Borough, on Cominco Alaska, and on Cominco's partner, the NANA Native Regional Corporation. Moreover, the Order, and EPA's assertion of the power to coerce ADEC to select EPA's preferred technology as BACT nullifies Alaska's authority and ability to manage a predictable, consistent PSD program for which it has had EPA approval for 15 years. In addition, EPA's Order subjects

ADEC employees to harsh civil and criminal penalties and sanctions for its violation, under § 113 of the CAA.

I would like to describe in more detail Alaska's grave concerns with your Order. First, I do not believe that EPA has the authority to issue such a broad Order. Under EPA's own rules and guidance, and under the EPA-approved State Implementation Plan (SIP) that is governing federal law, ADEC, not EPA, has final PSD permitting authority and the authority to make the final BACT determination for the new engine. That decision is subject to appeal under established state administrative procedures. Those procedures would have been the proper venue for EPA to question ADEC's BACT determination.

EPA issued its Order without participating in the permit issuing process or in the state's administrative process. Had EPA participated in ADEC's permitting process, and commented on the draft permit, it would have been accorded standing under state law to seek an adjudicatory hearing to review the BACT decision for the new engine. That process (unlike EPA's issuance of a § 167 order) would have afforded Cominco Alaska and other interested parties the opportunity to participate in the hearing and would have provided due process. EPA's failure to comment now precludes its resort to that administrative review process. See AS 46.14.200. The courts have stated that EPA's recourse when it disagrees with a state's exercise of discretion under an approved program is not to issue an order countermanding the state's decision, but rather to pursue its rights under the state's administrative process. EPA should not ignore the state process and then attempt to veto the state's decision after the fact.

Second, I believe that Alaska's BACT determination is appropriate, reasonable, and authorized under the CAA. Both federal and state law provide that BACT determinations are to be based upon an analysis of "energy, environmental, and economic impacts and other costs." CAA § 169(3); 18

AAC 50.990(13). EPA has chosen in its own BACT analyses to use a "top down" approach to comparing control technologies. That approach is found solely in EPA's internal guidance, and is not embodied in the CAA nor in implementing regulations. Nevertheless, ADEC has followed EPA's preferred "top down" approach in this case, and has fully explained its reasoning in the Technical Analysis Report that accompanies the permit. Yet EPA still asserts that Alaska's clearly discretionary determination of BACT "violates" the CAA, apparently just because EPA, had it written the permit, would have weighed the factors differently and chosen another control technology. I do not think that the fact that EPA may prefer a different BACT decision makes ADEC's decision a violation of the CAA.

Third, the process by which we got to this point did not demonstrate the usual good faith efforts to resolve differences that our agencies have shared in the past. Although EPA did not even enter this discussion until after the public process had concluded, ADEC held up issuance of the permit for five months to enable discussions to occur with EPA. In fact, we resolved several other issues to our mutual satisfaction, yet, inexplicably, those issues are still addressed in your Order.

Both Chuck Findley and I were trying to find a way to allow Cominco to begin its expanded operations while reserving the only remaining issue in dispute, the BACT determination for the one new diesel engine, MG#17. We had agreed that we did not want to engage in "brinkmanship" by which either EPA or the staff would attempt to achieve some litigation advantage based upon the timing of any order or permit.

I proposed issuing the state permit to allow operation of all engines but MG#17. The permit, as proposed, would specifically prohibit on-site construction of MG#17 until June and also prohibit any irreversible design or equipment procurement that would prevent the installation of SCR technology until May. This would have: allowed us to

continue with dispute resolution, afforded EPA the opportunity to use whatever remedy it chose if we could not reach agreement, allowed Cominco to operate, and avoided writing multiple permits for one facility. EPA rejected this proposal, apparently on the advice of their attorneys that EPA had to issue an order under § 167, although the basis for that advice has never been explained.

I next proposed that if EPA believed it had to issue an order, then we could issue simultaneously both the order and the permit, with an explicit agreement that we would go through dispute resolution and, if that failed, neither side would claim any advantage or suffer any penalty due to who issued which document first. Again, EPA declined, and instead rushed to issue an Order that is unclear, incorrect, and excessively broad. By doing so, EPA has now created an impossible situation for ADEC and its responsible officials, given the potential sanctions we face for violation of the Order.

I have carefully considered the issues EPA raised on the merits of the BACT determination, and the applicable legal authorities. I have carefully considered and weighed protection of the environment and the pros and cons of the different technologies. I have considered the importance of my responsibilities under the state's approved SIP to properly exercise my discretion to issue a PSD permit that, in my judgment, meets all applicable requirements. And, I have considered the importance to Alaska of being able to determine our own environmental and economic policy, as was envisioned by Congress in passing the Clean Air Act and setting forth the role of the states.

Accordingly, I have decided that I cannot and will not retract or render ineffective Cominco's permit, as you have ordered me to do. I am persuaded that, under Alaska's permit as written, significant deterioration will be prevented, and more control will be required of this source than EPA or any other state has required of similar sources in similar circumstances. Further, I have concluded that there is far more at stake here

than a single permit if EPA can simply issue an order negating the discretionary judgement that Alaska exercises under the CAA and pursuant to EPA's approval of Alaska's PSD program, based upon no other reason than that EPA favors another technology, especially when there is no appreciable gain in the surrounding environment. Indeed, if EPA has this authority, there would be no point in a state ever assuming PSD primacy. States would simply become contractors for EPA.

Although ADEC did, in fact, issue the permit with the delayed effective date for the new engine that we had previously proposed in order to proceed with dispute resolution with EPA, it appears that our disagreement over the core issue of which agency has the legal authority to make the final BACT determination for engine MG#17 precludes our ability to continue discussions. The specter of the potential penalties ADEC faces for violation of the Order requires that this core issue be resolved fast. I regret that we have reached this point, but the issuance of EPA's Order has changed the circumstances under which we have been operating. While we normally value and rely upon discussions with EPA, and we were more than willing to do so in this case, it is no longer possible to conduct reasonable discussion under the threat of such draconian sanctions.

For the reasons outlined above, I request that you retract the Order dated Dec. 10, 1999, so that we may continue our discussions on this matter. If you refuse to do so, I will seek review of the Order in the federal courts.

Sincerely,

/s/
Michele Brown

cc: The Honorable Ted Stevens, U.S. Senator
The Honorable Frank Murkowski, U.S. Senator
The Honorable Don Young, U.S. Representative
Carol Browner, Administrator, U.S. EPA
Charlie Curtis, NANA Regional Corporation
Helvi Sandvik, NANA Development Corporation
John Key, Cominco Alaska, General Manager
John Katz, Office of the Governor, Washington D.C.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

FEB 8 2000

Reply To
Attn Of: OAQ-107

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

Norman Mahoney
Registered Agent for
Cominco Alaska, Inc.
717 K Street
Anchorage, Alaska 99501

Re: Administrative Order
Cominco Alaska, Inc. - Red Dog Mine Facility

Dear Mr. Mahoney:

The enclosed Administrative Order is issued pursuant to Sections 113(a)(5) and 167 of the Clean Air Act (CAA or Act), 42 U.S.C. §§ 7413(a)(5) and 7477 and requires Cominco Alaska, Inc. (Cominco) to comply with the terms specified in it.

Section 113(a)(5) of the Act, 42 U.S.C. § 7413(a)(5) provides in part:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources, the Administrator may –

> (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;
>
> (B) issue an administrative penalty order in accordance with subsection (d) of this section; or
>
> (C) bring a civil action under subsection (b) of this section.

Section 167 of the Act, 42 U.S.C. § 7477, provides in part:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

The Alaska Department of Environmental Conservation (ADEC) Permit No. 9932-AC005 issued to Cominco on or about December 10, 1999, which allowed Cominco to commence construction of the Wartsila diesel generator MG-17 at the Red Dog mine facility fails to comply with Part C of the Act, 42 U.S.C. § 7470-7491, as well as the federal implementing regulations and the Alaska State Implementation Plan. Additionally, the permit was issued in violation of the Order issued to ADEC on December 10, 1999. EPA has issued a Finding of Noncompliance and Violation to ADEC under Section 113(a)(5) of the Act, finding that the State of Alaska failed to comply with Part C of the Act, 42 U.S.C. § 7470-7492, as well as the Federal and State implementing regulations when it issued this permit. Since this permit is invalid as it applies to MG-17, any construction of MG-17 pursuant to ADEC Permit No. 9932-AC005 is not authorized under the Act. The enclosed Administrative Order to

Cominco prohibits the construction of MG-17 prior to demonstrating compliance with Part C of the Act, 42 U.S.C. § 7470-7492, and obtaining a valid permit from ADEC for MG-17.

You have the opportunity to confer with EPA concerning this Order. If you wish to request a conference, to occur no later than March 16, 2000, please call Mr. Hardesty, Chief, Federal and Delegated Air Programs Unit, (206) 553-6641, within 10 days of the date of this letter.

Sincerely,

/s/
Chuck Findley
Deputy Regional Administrator

Enclosure

CC: John Key, General Manager, Cominco
Larry Hartig, counsel for Cominco
Michele Brown, ADEC

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

FEB 8 2000

Reply To
Attn Of: OAQ-107

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Michele Brown
Alaska Department of Environmental Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska 99801-1795

Re: ADEC Permit No. 9932-AC005 for Cominco Alaska, Inc.

Dear Ms. Brown:

This letter is in response to your letter to Chuck Clarke dated January 5, 2000, regarding the Alaska Department of Environmental Conservation's (ADEC's) prevention of significant deterioration (PSD) permit for the Cominco Alaska, Incorporated (Cominco) Red Dog mine facility and the EPA Finding of Noncompliance and Order issued to ADEC on December 10, 1999 (Finding and Order).

As your letter pointed out, EPA's Finding and Order was issued after months of discussion between ADEC and EPA concerning the permit and the proposed nitrogen oxides (NOx) emission limits for the new Wartsila diesel generator, MG-17, at the Red Dog mine. Throughout the discussions, EPA asserted that the State's record did not adequately support the State's determination that the Best Available Control Technology (BACT) for the Wartsila diesel genera-

tor MG-17 was low NOx controls rather than selective catalytic reduction (SCR). We also consistently pointed out that the Clean Air Act expressly provides that EPA retain a federal oversight role in states with an approved PSD program.

Your letter correctly asserts that EPA did not comment on the public record but chose to weigh-in after the State's process was closed. Here's why. The National Park Service has a specific role in review of PSD permits under Clean Air Act regulation. They commented during your process and, not seeing resolution of their issues, requested EPA's involvement.

I understand that you do not agree with our position on these important matters. In spite of the fact we did not reach agreement on either the BACT issue or the issue of EPA's authority, we did resolve a number of other concerns relating to the Cominco permit as it was originally proposed. I appreciate your willingness to explore these issues. I believe the discussions were worthwhile to further our mutual understanding of our respective approaches to protecting air quality in Alaska.

Your letter asserts the EPA's order subjects ADEC employees to harsh civil and criminal penalties. Please be aware that it is not EPA's general practice to name individual State employees when a particular State or State agency is identified as a respondent or defendant in a civil action to enforce the Clean Air Act. We have no intention of imposing sanctions against individual State employees in this matter.

The Finding and Order stated that issuance of a final PSD permit as proposed by ADEC would not be in compliance with the PSD requirements of the Clean Air Act and/or the Alaska SIP. The Finding and Order went on to state that ADEC was prohibited from issuing a PSD permit to Cominco's Red Dog mine facility with limits on the Wartsila diesel generator MG-17 based on low NOx controls (unless ADEC satisfactorily documented why SCR is not BACT).

We are in agreement with the remaining provisions of your permit.

Shortly after receiving the Finding and Order, ADEC issued Air Quality Construction Permit No. 9932-AC005 for the Cominco Red Dog mine. The final permit was accompanied by a Final Technical Analysis Report dated December 10, 1999 (TAR). This permit includes an emission limit based on low NOx controls for the Wartsila diesel generator MG-17.

Based on our review and analysis of the final permit and TAR, we conclude that both fail to comply with Federal and State PSD requirements. Thus, the State is not in compliance with the Clean Air Act. Please regard this as a formal finding under Section 113(a)(5) of the Clean Air Act.

It is still EPA's position that Cominco must obtain a PSD permit with an adequately supported BACT determination requiring the installation of BACT on MG-17 prior to commencing construction of that unit. Accordingly, pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 113(a)(5) and 167, EPA is issuing an Administrative Order to Cominco. The Order prohibits Cominco from constructing MG-17 until it receives a valid PSD permit for the unit that complies with the Act. The Order specifically allows Cominco to operate under all other provisions in ADEC Permit No. 9932-AC005. You will be sent a copy of the Order when it is issued to Cominco.

We continue to be willing to discuss this Finding of Non-compliance and Violation with you and your staff. Please feel free to contact me if you wish to discuss this issue further.

Sincerely,

/s/
Chuck Findley
Deputy Regional Administrator

cc: Tom Chapple, ADEC
John Key, General Manager, Cominco

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

MAR 7 2000

Reply To
Attn Of: OCR-158

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

Robert Connery
Holland and Hart
Suite 3200
555 Colorado Street
P.O. Box 8749
Denver, Colorado 80201-8749

Re: Cominco Alaska Inc.'s Request for Stay of EPA's Orders

Dear Mr. Connery:

On February 16, 2000, Cominco Alaska, Inc. (Cominco) requested that EPA stay the Order issued to the Alaska Department of Environmental Conservation (ADEC) on December 10, 1999, and the Order issued to Cominco on February 8, 2000. Cominco contends that the new Wartsila diesel generator, MG-17, is vital to the increased production at the Red Dog mine and that it will suffer lost revenue without it. Cominco also states that due to the short construction season it is feasible to pour concrete foundations for MG-17 only during July and August. Upon consideration of your request and in recognition of the unique weather-related construction limitations present at the Red Dog mine site, EPA is willing to amend the February 8, 2000 Order to Cominco. As amended, the Order does not prohibit the

pouring of concrete for the foundation or on-site activities that need to be undertaken during July and August for weather-related reasons. EPA is declining, however, to stay the December 10, 1999 Order to ADEC.

ADEC Permit No. 9932-AC005 issued to Cominco on or about December 10, 1999, which states that Cominco may commence construction of the Wartsila diesel generator MG-17 at the Red Dog mine facility, fails to comply with Part C of the Clean Air Act (Act), 42 U.S.C. § 7470-7491, as well as the federal implementing regulations and the Alaska State Implementation Plan. Additionally, the permit was issued in violation of the Order issued to ADEC on December 10, 1999. On February 8, 2000, EPA issued a Finding of Noncompliance and Violation to ADEC under Section 113(a)(5) of the Act, finding that the State of Alaska failed to comply with Part C of the Act, 42 U.S.C. § 7470-7492, issued this permit. Cominco received a copy of this notice of noncompliance by fax on February 8, 2000, and certified mail on February 16, 2000. Since this permit is invalid as it applies to MG-17, any construction of MG-17 pursuant to ADEC Permit No. 9932-AC005, with the exception of the activities specified in the enclosed Amended Administrative Order, is prohibited under the Order.

EPA respectfully disagrees with Cominco's position that because EPA has approved Alaska's PSD permitting program as part of the State implementation plan (SIP) EPA lacks the authority to take action in this instance. EPA's approval of a State PSD program does not divest the Agency of the duty to continue appropriate oversight to ensure that permitting decisions made by the State are consistent with the requirements of the Act, EPA regulations and the SIP. To the contrary, several sections of the Act expressly provide the Agency with oversight and enforcement authority over State PSD programs that EPA has approved. See sections 113, 167 and 505(b) of the Act.

Section 113(a)(5) of the Act provides that whenever EPA finds that a State is not acting in compliance with any PSD or other new source requirement of the Act, the Agency may issue an order prohibiting the construction or modification of any stationary source, issue an administrative penalty order or bring a civil enforcement action. This provision also plainly contemplates corrective action by EPA when the Agency believes that a State is not properly implementing new source permitting requirements under its SIP. Sections 113(a)(5) and 167 were the basis for EPA's February 8, 2000 Order to Cominco and are the basis for this Amended Order.

Section 167 of the Act provides that EPA shall issue administrative orders, initiate civil actions or take whatever other action may be necessary to prevent construction of a major stationary source that does not conform to the requirements of the PSD program. Since the Act contemplates that SIPs will include approved PSD programs (see sections 110(a)(2)(C) and 161), it is clear that EPA's authority under section 167 applies to SIP-approved programs, such as Alaska's. Section 167 was the basis for EPA's December 10, 1999 Order to ADEC.

Accordingly, the enclosed Amended Administrative Order is issued pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 7413(a)(5) and 7477, and requires Cominco to comply with the terms specified in it. This Amended Administrative Order supersedes and vacates the Administrative Order issued to Cominco on February 8, 2000. The enclosed Amended Administrative Order to Cominco no longer prohibits Cominco from undertaking certain specified activities associated with the construction of MG-17 and selective catalytic reduction (SCR). With the exception of the specified activities, however, the Amended Administrative Order prohibits the construction and installation of MG-17 prior to demonstrating compliance with Part C of the Act, 42 U.S.C. § 7470-7492, and obtaining a valid permit from ADEC for MG-17.

You have the opportunity to confer with EPA concerning this Order. If you wish to request a conference, please call Mr. Douglas Hardesty, Manager, Federal and Delegated Air Programs Unit, within 5 days of issuance of this Order. He may be reached at (206) 553-6641. Such a conference shall occur no later than March 23, 2000. The enclosed Amended Order is effective March 24, 2000.

Sincerely,

/s/
Chuck Findley
Deputy Regional Administrator

Enclosure

CC: John Key, General Manager, Cominco
Larry Hartig, counsel for Cominco
Michele Brown, ADEC

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

MAR 7 2000

Reply To
Attn Of: OAQ-107

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

Norman Mahoney
Registered Agent for
Cominco Alaska, Inc.
717 K Street
Anchorage, Alaska 99501

Re: Administrative Order
Cominco Alaska, Inc. - Red Dog Mine Facility

Dear Mr. Mahoney:

The enclosed Amended Administrative Order is issued pursuant to Sections 113(a)(5) and 167 of the Clean Air Act, 42 U.S.C. §§ 7413(a)(5) and 7477, and requires Cominco to comply with the terms specified in it. This Amended Administrative Order supersedes and vacates the Administrative Order issued to Cominco on February 8, 2000. The enclosed Amended Administrative Order to Cominco no longer prohibits Cominco from undertaking certain specified activities associated with the construction of MG-17 and selective catalytic reduction (SCR). With the exception of the specified activities, however, the Amended Administrative Order prohibits the construction and installation of MG-17 prior to demonstrating compliance with Part C of the Act, 42 U.S.C. § 7470-7492, and obtaining a valid permit from ADEC for MG-17.

Cominco has the opportunity to confer with EPA concerning this Order. If you wish to request a conference, please call Mr. Douglas Hardesty, Manager, Federal and Delegated Air Programs Unit, within 5 days of issuance of this Order. He may be reached at (206) 553-6641. Such a conference shall occur no later than March 23, 2000.

Sincerely,

/s/
Chuck Findley
Deputy Regional Administrator

Enclosure

CC: John Key, General Manager, Cominco
Larry Hartig, counsel for Cominco
Robert Connery, counsel for Cominco
Michele Brown, ADEC

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 14 1983

MEMORANDUM

SUBJECT: Guidance On Enforcement of Prevention of Significant Deterioration Requirements Under the Clean Air Act

FROM: Michael S. Alushin
Associate Enforcement Counsel for Air

Edward E. Reich, Director
Stationary Source Compliance Division

TO: Regional Counsels
Regions I-X

Directors, Air Management Divisions
Regions I, V and IX

Directors, Air and Waste Management Divisions
Regions II-IV, VI-VIII, and X

This guidance discusses enforcement of Part C of Title I of the Clean Air Act, dealing with the prevention of significant deterioration (PSD) of the ambient air quality. The guidance explains the use of Section 167 of the Clean Air Act as an enforcement tool and provides assistance in choosing between §167 and the alternatives available for enforcing against PSD violations. Violations of Part C include construction or operation of a PSD source (as defined under the Act and the PSD regulations) without a permit, construction or operation with an invalid permit, and construction or

operation in a manner not consistent with a validly issued permit.

We believe that §167 of the Act provides EPA with a significant enforcement mechanism in addition to §113, the Agency's main enforcement tool, but it does not preclude resort to any remedies available under §§113 or 120. Section 167 should be used in situations where a source is constructing or operating without a valid permit or in violation of a valid permit and EPA's main interest is a quick imposition of injunctive relief to stop the violation. Where time is not of the essence and/or the Agency wishes to collect penalties in addition to exacting injunctive relief, §§113 or 120 provide more appropriate remedies. Thus, depending upon the circumstances of a particular case, EPA may commence one or more of the following actions against a source that is in violation of PSD requirements:

(a) Issue an order or seek injunctive relief under §167 to prevent the source from constructing or operating in violation of the PSD requirements;

(b) Issue an order to comply under §113(a);

(c) Seek civil remedies under §113(b);

(d) Seek criminal penalties under §113(c);

(e) Assess and collect noncompliance penalties under §120.

I. Analysis of Section 167

Section 167 of the Clean Air Act provides:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area included in the list promulgated pursuant to paragraph (1)(D) or (E) of subsection (d) of Section

107 of this Act and which is not subject to an implementation plan which meets the requirements of this part.

42 U.S.C. §7477 (1978)

Depending upon whether or not EPA has approved a State's Part C (PSD) State Implementation Plan (SIP) provisions under Section 110(a)(2) of the Clean Air Act or delegated the PSD program to the State, Section 167 creates two separate and distinct enforcement obligations for EPA. This is consistent with EPA's policy of allowing the States primacy where they have the main responsibility for a program. In those States that have not been delegated the PSD program or do not have approved SIP PSD provisions as required by §161 (PSD requirements for SIPs), EPA has the authority to regulate the construction of all major emitting sources that are subject to PSD review under the Act. Any person wishing to construct such a source in one of those States will be required by §165 (preconstruction requirements) to obtain a PSD permit from EPA. If the proposed source would violate the provisions of the PSD regulations, EPA must deny the permit. If EPA issues a permit, the Agency will be responsible for initiating appropriate proceedings should the source subsequently violate any permit provisions. Likewise, the Agency is responsible for taking enforcement action against a source which commences construction without first obtaining a PSD permit.

Once its PSD SIP provisions have been approved or delegated, pursuant to §110(a)(2) and 40 CFR 51.24, the State, rather than EPA, assumes primary responsibility for administering the PSD program. The Agency does not completely relinquish its obligations, however. Rather, it assumes an oversight function. PSD permits issued by the State remain federally enforceable. 40 CFR §§52.02(d), 52.21(r), and 52.23. If the State takes appropriate enforcement action, it is unnecessary for EPA to initiate enforcement proceedings. If the State fails to take appropriate action, however, Section 167 provides that EPA must take measures adequate to

prevent the construction of the noncomplying source. EPA can take such action at any time the Agency deems it necessary. The Agency is not forestalled by any action initiated by the State from simultaneously or subsequently taking action against a source that already had commenced construction or operation. Thus, EPA retains PSD enforcement authority and, where appropriate, is expected to initiate PSD enforcement proceedings both before and after the PSD SIP revisions have been approved.[1/]

Additionally, §167 requires EPA to take action directly against a source found being constructed or operating pursuant to a PSD permit that conflicts with the requirements of the Clean Air Act, implementing regulations, or approved SIP requirements. This provision gives the Administrator authority similar to that possessed under §113(a)(5) and (b)(5) to prevent illegal construction or operation of new sources in nonattainment areas.

* * *

B. Construction With an Invalid Permit

EPA will also be able to utilize the provisions of §167 to prevent a source from constructing with a State-issued permit

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1/ Senator Muskie noted this continuing Federal enforcement obligation. He stated: "[o]nce the State adopts a permit process in compliance with this provision, the Environmental Protection Agency role is to seek injunctive or other judicial relief to assure compliance with the law." 123 Cong. Rec. S 9169 (daily ed. June 8, 1977) (remarks of Senator Muskie). Senator Muskie's reference to "injunctive or other judicial relief" should not be construed as precluding resort to an administrative order mechanism. Such an interpretation would conflict with the clear wording of §167. Rather, we believe that Senator Muskie's reference to "other judicial relief" provides clear support for the proposition that EPA may resort to the civil and criminal penalties provisions of §113(b) and (c).

that EPA feels is invalid. There are basically two types of situations involving construction with an invalid permit. In the most common situation, the source can be expected to obtain a valid permit quickly. In other circumstances, however, it cannot be expected that a valid permit can issue soon. Before deciding on a course of action to be taken with a source constructing pursuant to an invalid permit, an EPA Regional Office needs to make a probability assessment as to the likelihood that a source will be able to obtain a valid permit quickly. For the purposes of allowing construction pursuant to an invalid permit, the period of thirty (30) days (the period analogous to that allowed under a Section 113(a) order) should be considered to be "quickly."

In the situation where EPA believes a valid permit will issue quickly, the procedures to be followed should be similar to those used under §113(a)(5) to prevent the construction of new sources in nonattainment areas. Sources should be issued an order, specifying precisely the nature of the defect in the permit, and given 30 days in which to obtain a valid permit while they proceed with construction. Issuance of an immediate cease construction order, while available, usually would be an unnecessary sanction. A source that has obtained a PSD permit, even though invalid, has presumably undergone some preconstruction review. Moreover, since it is the State, rather than the source itself, that is primarily at fault, immediate sanctions might be inappropriate.

In some situations, however, such as those where EPA believes that a source cannot be operated without violating an increment or where construction will foreclose EPA's options in terms of what BACT requirements will apply to a source, an immediate cease construction order under §167 should be issued and construction should not be allowed to commence or continue until a valid permit is issued.

In cases against sources constructing pursuant to an invalid permit, the error is presumed to have been the State's.

Therefore, even though construction may be halted, no penalty is appropriate unless the source is somehow at fault or the source does not cooperate after the discovery of the violation. For no-penalty actions, §167 is an effective enforcement tool.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 15 1988

MEMORANDUM

SUBJECT: Procedures for EPA to Address Deficient New Source Permits Under the Clean Air Act

FROM: Michael S. Alushin
Associate Enforcement Counsel for Air
Office of Enforcement and Compliance Monitoring

John S. Seitz, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Addressees

I. Introduction

This guidance applies to permits issued for major new sources and major modifications under both the prevention of significant deterioration (PSD) program and the nonattainment new source review (NSR) program. It contains three sets of procedures -- one for permits issued pursuant to EPA-approved state programs (NSR permits and PSD permits in more than half the states) one for permits issued by states pursuant to delegations of authority from EPA, and one for instances where EPA issues the permit directly. An appendix of model forms appears at the end.

The need for this guidance has become increasingly evident in the last two years. Before then, EPA had attempted only once, in 1981, to enforce against sources constructing or operating with new source permits the Agency determined to

be deficient. In 1986, EPA litigated Greater Detroit Recovery Facility v. Adamkus et al. No. 86-CU-72910-DT (October 21, 1986). In that case, EPA wanted to enforce against a major stationary source constructing with a PSD permit issued by Michigan under a delegation agreement with EPA. The Agency had first determined that the best available control technology (BACT) determination for SO_2 in the permit was inadequate. Before EPA started formal enforcement action, the source filed suit against the Agency, arguing that EPA had no authority to "second guess" the BACT determination and that, in any event, we should be equitably foreclosed from challenging the permit because we had remained silent during the two years since we had failed to comment on the permit. The court agreed and granted the source's motion for summary judgment.

The Detroit case was an example of the need for prompt and thorough EPA review of and written comments on new source permits. Our ability to influence the terms of a permit, both informally and through legal procedures, diminishes markedly the longer EPA waits after a permit is issued before objecting to a specific term. This is due both to legal constraints, that is, tight time limits for comments provided in the regulations, and to equitable considerations that make courts less likely to require new sources to accept more stringent permit conditions the farther planning and construction have progressed. Accordingly, as a prerequisite to successful enforcement action, it is imperative that EPA review all major source permit packages on a timely basis and provide detailed comments on deficiencies. If EPA does not obtain adequate consideration of those comments, it is also important for EPA to protect air quality by prompt and consistent enforcement action against sources whose permits are found lacking.

Because PSD permits are issued on a case-by-case basis, taking into consideration individual source factors, permitting decisions involve the exercise of judgment. However, although not an exhaustive list, any one of the following

factors will normally be sufficient for EPA to find a permit "deficient" and consider enforcement action:

1. BACT determination not using the "top-down" approach.
2. BACT determination not based on a reasoned analysis.
3. No consideration of unregulated toxic pollutants in BACT determination.
4. Public notice problems – no public notice & comment period or deficiencies in the public notice.
5. Inadequate air quality modeling demonstrations.
6. Inadequate air quality analysis or impact analysis.
7. Unenforceable permit conditions.
8. For sources that impact Class I areas, inadequate notification of Federal Land Manager or inadequate consideration of impacts on air quality related values of Class I areas.

In NSR permitting, each of the following factors, while not necessarily an exhaustive list, are grounds for a deficient permit:

1. Incorrect LAER determination, i.e., failure to be at least as stringent as the most stringent level achieved in practice or required under any SIP or federally enforceable permit.
2. No finding of state-wide compliance.
3. No emissions offsets or incorrect offsets.
4. Public notice problems – no public notice and comment or deficiencies in public notice.
5. Unenforceable permit conditions.

DECLARATION OF DOUGLAS E. HARDESTY

I, Douglas E. Hardesty, declare as follows:

Introduction

1. I am the manager of the Federal and Delegated Programs Unit, Office of Air Quality, Region 10, United States Environmental Protection Agency (EPA or the Agency). I have served in this capacity since late 1997. My unit is responsible for the federal implementation and the Agency's oversight of states' Clean Air Act (CAA) permitting programs in Region 10. EPA's Region 10 encompasses the States of Alaska, Idaho, Oregon and Washington.

2. I was, and am, very familiar with the EPA actions at issue in this case. I was personally and regularly involved in communications with the State of Alaska and EPA management. With respect to the State's best available control technology decision for the generator at issue in this case, senior EPA regional management accepted my recommendations.

3. On June 21, 2000, I certified that to the best of my knowledge and belief, the documents identified in the Cominco Alaska, Inc., Index to the Administrative Record constitute the complete administrative record of the following EPA actions challenged by Petitioners State of Alaska, Department of Environmental Conservation (ADEC) and Cominco Alaska, Inc. (Cominco) in this case:

(a) the December 10, 1999 Finding of Noncompliance and Order issued to ADEC under sections 113(a)(5) and 167 of the CAA (the Order part of which EPA withdrew on April 25, 2000);

(b) the February 8, 2000 Administrative Order issued to Cominco under sections 113(a)(5) and 167 of the CAA; and

(c) the March 7, 2000 Amended Administrative Order issued to Cominco under sections 113(a)(5) and 167 of the CAA.

For ease of reference, I will refer to these actions as the "findings and orders." The index to the certified Administrative Record is attached to this declaration (Attach. A). The findings and orders are not attachments to this declaration, but they are in the Administrative Record at, respectively, bate stamps COM 1, COM 3, and COM 7 (they also can be found in Petitioners' Combined Excerpts of Record (PER) 234-37; 254-70; and 340-59). (Counsel informs me that a complete copy of the Administrative Record was filed with the Court on January 11, 2001.)

4. On March 27, 2001, the Court issued an Order which gave EPA the option to proceed by "submit[ting] a complete administrative record which will allow this Court to review the justifications for the EPA's decisions to issue the Orders before us." Since the Court's Order of March 27, 2001, I have reviewed again the documents contained in the Administrative Record. I hereby reaffirm the completeness of that record. To the best of my knowledge and belief, the Administrative Record filed with the Court contains all the documents that I and other EPA decision-makers considered and relied upon when issuing the findings and orders. In this declaration, I will point out the key documents that led up to EPA's decision that ADEC's December 10, 1999 Permit No. 9932-AC005 did not subject Cominco's proposed MG-17 power generator to the best available control technology (BACT) to limit emissions of nitrogen oxides (NOx), a regulated air pollutant, as required by CAA section 165(a)(4), 42 U.S.C. § 7475(a)(4), and Alaska's State Implementation Plan (SIP). I will point to excerpts in the Administrative Record where EPA explained its basis for concluding that ADEC's record and analysis did not support its selection of low NOx controls (Low NOx), as opposed to selective

catalytic reduction (SCR), as the BACT for the MG-17 generator.

5. In brief, and as explained in more detail below:

(a) Between December 10, 1999 and March 7, 2000, EPA issued a series of findings and orders related to a permit action involving the State of Alaska and Cominco. EPA took these actions because ADEC acted arbitrarily and capriciously in determining the BACT for the MG-17 generator.

(b) If their programs are approved by EPA, states have a statutory obligation to determine what constitutes BACT, an emission limitation based on the maximum degree of emission reductions that is achievable for a major source of air pollution, after taking into account the energy, environmental, and economic impacts and other costs of achieving that reduction. These state permitting authorities have discretion in determining how they will weigh these various statutory considerations in a BACT analysis. However, EPA may intervene in such permit actions if the State fails to exhibit a lawful and rational exercise of discretion.

(c) For the Cominco permit action at issue, ADEC stated that it was using the widely accepted "top-down" approach to determining BACT (explained below) as its methodology for weighing the various considerations. Under this methodology, the most stringent control candidate -- in this case, selective catalytic reduction -- is presumed to be the best available control technology. A less effective alternative – like low NOx burners – may be chosen only if the permit applicant demonstrates that energy, environmental, and/or economic impacts and other costs would make application of the "top" control unreasonable or inappropriate for that facility.

(d) In this case, EPA repeatedly expressed concern to ADEC that its analysis and record as provided to EPA failed to justify its decision that Low NOx was BACT for the

Cominco's proposed MG-17 power generator. EPA encouraged the State and Cominco to provide information that would support rejecting the most stringent control candidate, SCR. ADEC's own record shows SCR to be technically and economically feasible, and to have no adverse environmental or energy impacts if applied to the Cominco facility.

(e) EPA ultimately concluded that without a reasoned basis for rejecting SCR based on energy, environmental and economic impacts and other costs, ADEC's decision that Low NOx is BACT was arbitrary and capricious. Consequently, EPA issued the findings and orders at issue in this case. This declaration highlights areas of the State's record and analysis EPA reviewed in reaching a decision to issue the findings and orders.

The State's Responsibilities in Issuing Prevention of Significant Deterioration Permits

6. When a state, such as Alaska, has a prevention of significant deterioration (PSD) program as part of its state implementation plan (SIP) that has been approved by EPA, the state becomes responsible for issuing permits that comply with the PSD requirements of the CAA and applicable regulations and policies. These include the state's own SIP, regulations, and guidance. Here, ADEC administers Alaska's PSD program, and in issuing PSD permits must insure that, among other things, a major new or modified source of air pollution (like Cominco's proposed MG-17 generator) installs BACT.

7. One of the CAA's PSD requirements is that major new or modified sources be "subject to the best available control technology" for each regulated air pollutant. 42 U.S.C. § 7475(a)(4). Alaska's PSD program states that ADEC "will issue a permit only if the applicant shows that . . . the best available control technology for controlling

emissions of each pollutant will be installed." 18 AAC 50.400(c)(3)(A) (1983) (Attach. B).

8. The CAA defines BACT as "an emissions limitation based on the maximum degree of reduction of each [regulated pollutant] . . ., which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility." 42 U.S.C. § 7479(3). Similarly, Alaska's PSD program defines BACT as "that emission limitation which represents the maximum reduction achievable for each regulated air pollutant, taking into account energy, environmental and economic impacts, and other costs." 18 AAC 50.900(9) (1991) (Copies of these federal and state provisions can be found in Brief for Respondents, Tabs A and B.)

9. In part "to assist permitting authorities and PSD applicants in conducting BACT analysis," EPA issued a draft New Source Review Workshop Manual (Manual) in 1990. COM 71-001 (Attach. C) (The entire portion of the Manual pertaining to BACT, Chapter B, can be found in Respondents' Supplemental Excerpts of Record (RER), Tab 2.) To best implement the statute, EPA follows, and the Manual recommends, a "top-down" approach to analyzing and determining BACT:

> In brief, the top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent – or "top" – alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not "achievable" in that case. If the most stringent technology is eliminated

in this fashion, then the next most stringent alternative is considered, and so on.

COM 71-086.

10. The "top-down" approach not only is the Agency's recommended guidance but also is, as ADEC correctly stated, the "most commonly used procedure for determining BACT." COM 33-029 (which also can be found at PER 029). In this case, at all times, ADEC stated that it was applying the "top-down" approach to determine BACT for Cominco's MG-17 generator. COM 17-040 (Preliminary Report of May 1999); COM 29-042 (Revised Report of September 1999); and COM 33-044 (Final Report of December 1999).

EPA's Role in States with Approved PSD Programs

11. In Region 10, the States of Alaska, Idaho and Oregon have EPA-approved PSD programs. That means that in these states, the state issues PSD permits for the construction or modification of major stationary sources. EPA's role is one of overseeing state permitting actions to assure that the permits comply with the CAA and SIP requirements and, if appropriate, taking enforcement action. As explained in an EPA guidance memorandum from 1983,

> Once its PSD SIP provisions have been approved . . ., the State, rather than EPA, assumes primary responsibility for administering the PSD program. The Agency does not completely relinquish its obligations, however. Rather, it assumes an oversight function. . . . EPA retains PSD enforcement authority and, where appropriate, is expected to initiate PSD enforcement proceedings . . . .

COM 69-003 (Attach. D) (This memorandum can be found, in its entirely [sic], at RER, Tab 1.)

12. EPA has long understood its oversight and enforcement authority in states with approved PSD programs, like Alaska, to encompass the requirement to ensure that new or modified sources of air pollution be subject to BACT controls. For example, a EPA guidance memorandum from 1988 states that

> Because PSD permits are issued on a case-by-case basis, taking into consideration individual source factors, permitting decisions involve the exercise of judgment. However, although not an exhaustive list, any one of the following factors will normally be sufficient for EPA to find a permit "deficient" and consider enforcement action:
>
> 1. BACT determination not using the "top-down" approach.
>
> 2. BACT determination not based on a reasoned analysis.
>
> . . . .

COM 70-002 (Attach. E). A 1993 EPA guidance memorandum similarly advises the Agency's Regions to

> follow[] two general principles in reconciling the tensions between the state and federal responsibilities in the administration of [new source review (NSR)] programs [such as the PSD program]. First, it is the state that must make the final decision on all issues relating to the specific permit. There is no suggestion in the Act's NSR provisions that EPA has authority to second-guess the state on matters that are a lawful and rational exercise of discretion properly conferred upon the state. Second, and conversely, EPA is the agency with primary authority to interpret the federal law. In so doing, EPA acts to ensure that the state exercises its discretion within the bounds of the law and otherwise acts in accordance with applicable

> statutory and regulatory norms. In carrying out these principles, it is apparent that EPA acts largely as a guarantor that the state follow applicable procedures and not act arbitrarily or violate any objective standards that may apply, while the state remains free to exercise informed judgment in making the determinations. * * * For example, . . . in the case of a decision applying . . . BACT under section 165(a)(4) for PSD, if a state has met all procedural norms, considered all available control technologies, and given a reasoned justification for the basis of its decision, EPA has no grounds on which to challenge a final substantive state decision that does not violate such objective standards.

COM 72-002, 003 (Attach. F).

13. As specified in CAA section 165(d), 42 U.S.C. § 7475(d), states must send EPA a copy of each PSD permit application and notify EPA of every action relating to it. Under my supervision, Region 10 employees review PSD permits proposed by states to determine whether a proposed permit is consistent with the requirements of the CAA and the standards for issuing permits established by the State, and provide comments to the state permitting authorities as necessary.

14. In this case, as explained below, EPA reviewed the Cominco permit for, among other things, compliance with the BACT requirement. EPA reviewed the adequacy of ADEC's record to support its BACT determination pursuant to ADEC's chosen "top-down" approach (which, as noted, is consistent with EPA guidance).

ADEC's May 1999 Preliminary Proposed Permit

15. On May 4, 1999, ADEC issued and submitted for public comment a proposed PSD permit for the Cominco Red Dog Mine facility. The proposed permit is in the Administrative Record at COM 18.

16. The proposed permit was accompanied by ADEC's Preliminary Technical Analysis Report (Preliminary Report) which describes, among other things, the state's assessment of the best available control technology for the MG-17 generator. The Preliminary Report is in the Record at COM 17, and excerpts are attached to this declaration (Attach. G) (more excerpts can be found at RER, Tab 5).

17. As the Preliminary Report states, the proposed permit would allow Cominco to implement a production rate increase project at the Red Dog zinc mine in Alaska. The project is intended to increase the mill's processing rate to 3,500,000 tons of ore per year and raise concentrate production to 1,400,000 tons per year. COM 17-006. The project and the operation of the new or modified equipment as proposed by Cominco will result in an increase of NOx emissions of over 1,100 tons per year, among the increased emissions of many other regulated air pollutants. COM 42-003 (Document COM 42 is part of Cominco's amended application, and can also be found at RER, Tab 4.) Two power generators, the existing MG-5 and the proposed new MG-17, were among the emission sources that were subject to BACT review at the time of the Preliminary Report. COM 17-039.

18. The BACT analysis for MG-17 and MG-5 that ADEC first submitted for public comment is in the Administrative Record at COM 17-030 through 17-045. The Preliminary Report first states that "[o]f the available control technologies, [selective catalytic reduction (SCR)] is the most stringent control, providing 90% reduction of NOx." COM 17-042. Also, ADEC found that "SCR is technically and economically feasible." COM 17-030. ADEC specifically evaluated the costs associated with a number of scenarios using SCR and found "all of the costs shown on [Table 4.1.3] to be economically feasible." COM 17-042. These costs ranged from $ 1,586 to $5,643 per ton of NOx removed. COM 17-042. ADEC stated that SCR's costs "are well

within what ADEC and EPA considers economically feasible" COM 17-042. ADEC, though, chose as BACT a less stringent emission control technology, Low NOx, instead of SCR "due to other considerations." COM 17-030. These "other considerations" were Cominco's proposal to retrofit Low NOx modifications to Cominco's existing Wartsila generators MG-1, MG-2, MG-3, MG-4 and MG-6. Relying on the emission reductions resulting from the low NOx modifications to MG-1, MG-2, MG-3, MG-4 and MG-6, ADEC found low NOx controls to constitute BACT on generators MG-5 and MG-17. COM 17-045.

19. Essentially, ADEC's Preliminary Report concluded that BACT for the MG-5 and MG-17 generators was SCR, but rather than directly impose the SCR-based emission limitation on these units, ADEC attempted to "bubble" or "emissions trade" these units with other existing units at that plant to achieve an SCR-equivalent level of emission reductions across the plant.

20. The Red Dog Mine is located in Northwest Alaska about 5 miles west of the Noatak National Preserve and 32 miles northeast of Cape Krusenstern National Monument. The National Park Service, the federal land manager for these areas, submitted comments on the proposed permit. Its comments included the concern that the proposed permit did not require emission limits based on BACT for the MG-17 (as well as MG-5). These comments are in the Administrative Record as document COM 46 (which also can be found at RER, Tab 7).

21. Following the National Park Service's comments, EPA identified a number of concerns with the proposed permit and Preliminary Report, including the BACT determination for the Wartsila generators. I directed my staff to conduct staff level discussions with ADEC staff regarding our concerns. On July 29, 1999 Anita Frankel, Director of Region 10's Office of Air Quality (my supervisor at the

time), sent a letter to Tom Chapple, ADEC, reiterating EPA's major concerns with the proposed permit:

> Although ADEC states in its analysis that selective catalytic reduction (SCR), the most stringent level of control, is economically and technologically feasible, ADEC did not propose to require SCR. Instead, ADEC concluded that installation of [Low NOx] on all seven generators and fuel injection retard [] on some of the generators constituted BACT. EPA disagrees with this conclusion and believes that SCR is BACT for [MG-5] and [MG-17]. As we discussed, once it is determined that an emission unit is subject to BACT, the PSD program does not allow the imposition of a limit that is less stringent than BACT even if equivalent emission reductions are obtained by imposing new controls on other emission units.

COM 47-001 (Attach. H) (which can also be found at RER, Tab 9). I note that EPA reviewed ADEC's preliminary determinations as part of the Agency's review of the adequacy of ADEC's subsequent record on the permit. ADEC bares [sic] a burden of not only providing a reasoned justification for its final BACT determination, but it must also show how it has responded to public comment and explain any basis for changing its determination when it issues the final permit.

22. Ms. Frankel's comment about BACT being unit-specific (that is, not subject to the kind of "emissions trading" that ADEC's Preliminary Report engaged in) is supported by Alaska's SIP. It states that ADEC "will issue a permit only if the applicant shows that . . . [BACT] . . . will be installed and used for <u>each</u> new or modified source." 18 AAC 50.400(c)(3)(A) (1983) (emphasis added) (Attach. B). (A similar provision of the Alaska SIP is quoted in an EPA letter to ADEC, COM 50-002 (Attach. L).) EPA's Manual similarly states that the "BACT requirement applies to <u>each</u> individual new or modified affected emission unit and

pollutant activity at which a net emissions increase would occur." COM 71-088 (emphasis added).

ADEC's September 1999 Revised Proposed Permit

23. In early September 1999, ADEC issued a revised proposed PSD permit for the Cominco Red Dog Mine facility. The revised proposed permit is in the Administrative Record at COM 30.

24. The revised proposed permit was accompanied by ADEC's revised Technical Analysis Report (Revised Report). The Revised Report is in the Record at COM 29, and excerpts are attached to this declaration (Attach. I) (excerpts can also be found at RER, Tab 12).

25. With respect to the BACT determination for the MG-17 and MG-5 generators, the Revised Report acknowledged that the Preliminary Report's reliance on "other considerations" (that is, emissions trading) for a BACT decision was improper:

> In this case, the emissions reductions achieved by the applicant's proposal to retrofit the existing, unmodified engines into a 1999 configuration is not a consideration of the BACT review provided for by the applicable law and guidelines. Therefore, it cannot be used to temper the stringency of BACT.

COM 29-047.

26. The Revised Report also reaffirmed ADEC's reliance on the top-down methodology for selecting BACT, providing a detailed accounting of the process. COM 29-044. ADEC further explained the objective criteria that are to be applied (and by which EPA should judge the adequacy of ADEC's record and analysis) when an applicant attempts to demonstrate that more effective controls are not achievable:

> When Congress created the BACT definition, they allowed the stringency of the BACT to be tempered by considerations of one or more collateral impacts – energy, environmental, or economic. This was intended to account for situations where the use of BACT in one area of the country was not applicable to another area of the country, due to differences in feedstock material, plant configuration, or other reasons.
>
> EPA and the courts have interpreted the collateral impacts clause to serve as a safety valve, allowing a less stringent BACT whenever compelling and atypical energy, environmental, or economic circumstances specific to a facility constrain it from using [] the most effective technology.

COM 29-045.

27. Despite the facts that (1) selective catalytic reduction is the most effective control technology available, COM 29-033, 29-042; (2) has favorable environmental impacts, COM 29-048, 29-049; and (3) contributes no adverse energy impacts, COM 29-050; ADEC continued to select Low NOx as BACT. COM 29-055. ADEC stated that, with respect to SCR's economic impacts, Cominco claimed that the "costs are very significant, affecting Cominco's cost of production and competitiveness in the world markets." COM 29-051. Yet, according to ADEC, Cominco did not present "detailed financial information showing [SCR's cost's] effect on the operation." COM 29-053. As such, ADEC could not and did not make any "judgment" about the site-specific impact of SCR's costs "on the operation, profitability, and competitiveness of the Red Dog Mine." COM 29-053. Instead, ADEC estimated a unit cost for SCR on both generators (3 cents per kilowatt-hour) and concluded that this

> would be equivalent to a 20% increase in the electric rate of the facility. In [ADEC's] judgment, this is a dispro-

> portionate cost increase when [Cominco is] viewed as an electric utility. Furthermore, the cost [of SCR, estimated at $2,100 per ton of NOx removed] is significantly higher on a cost-per-ton removal basis in comparison to the $0 to $936/ton of recent BACT decision[s] for similar installations.

COM 29-053.

28. Before and after ADEC's revised proposed permit, I recall several conversations with ADEC permit staff and supervisors in which they stated that they personally believed that SCR was economically feasible. An August 1999 intra-ADEC memorandum confirms this. COM 21 (Attach. J) (excerpts also can be found at RER, Tab 10). In this memorandum, ADEC staff stated that "[i]t is clear that SCR (the most effective individual technology) should be considered technologically, environmentally, and economically feasible for the Red Dog power plant engines." COM 21-022.

29. After issuance of the Revised Report, EPA and ADEC engaged in additional conversations. In a letter to ADEC on September 15, 1999, Ms. Frankel stated that

> EPA remains concerned that the PSD analysis conducted by Cominco and accepted by ADEC is inadequate for several reasons. . . . EPA disagrees with ADEC's determination that the Best Available Control Technology [] for Wartsila generators MG-5 and MG-17 is low NOx burners rather than selective catalytic reduction [].

COM 48-001 (Attach. K) (also on file with the Court as RER, Tab 13). Ms. Frankel "urge[d] ADEC to delay issuance of the PSD permit to Cominco and to conduct a thorough PSD analysis of all the modifications to the facility, including the diesel generators[.]" COM 48-003.

30. A letter dated September 20, 1999, from the National Park Service expressed continued concern over the proposed permit and ADEC's approach to BACT for the MG-17 and MG-5 generators. The letter also contained a description of other applications of SCR and a list of close to 200 applications of SCR to oil and gas fired engines around the world, contradicting ADEC's statement that "the cost is significantly higher on a cost-per-ton removal basis in comparison to the $ 0 to 936/ton of recent BACT decision[s] for similar installations." COM 49-002, 49-003 (Attach. L) (which also can be found at RER, Tab 14). (After receiving a copy of the Service's letter, EPA apparently removed from document COM 49 the list of the nearly 200 applications of SCR, but the list is in the Administrative Record at COM 50-014 through 50-020.). The National Park Service also provided information to support the comment that

> although ADEC formerly accepted SCR as economically feasible at a cost as high as $5,643 per ton of NOx removed, it has now concluded that a cost as low as $2,100 is excessive. . . . Our experience in reviewing permit applications across the U.S. is that states are typically setting a cost effectiveness range of $2,000 - 5,000 per ton of NOx, with $ 4,000 per ton the most frequently used threshold.

COM 49-004.

31. Additionally, Charles E. Findley, Region 10's then-Deputy (now Acting) Regional Administrator, talked with Michele Brown, ADEC Commissioner, to further explain EPA's concerns and to better understand the State's rationale for its permitting decisions. Following that conversation, on September 29, 1999, Ms. Frankel sent a letter to ADEC summarizing EPA's concerns and describing our review of the State's Preliminary and Revised Reports. COM 50 (Attach. M) (which also can be found at RER, Tab 15). EPA explained its agreement with ADEC that SCR is

technically feasible, and that ADEC appropriately evaluated environmental and energy considerations. COM 50-003, 50-004. EPA found insufficient, however, ADEC's economic impact analysis: "elimination of SCR as BACT based upon cost-effectiveness grounds is not supported by the record and is clearly erroneous." COM 50-004. As EPA explained,

> Cost-effectiveness [dollars per ton of pollutant reduced] is one of the economic impact analysis which may be considered when determining if a technology represents BACT for a specific application. However, a poor cost effectiveness in and of itself should not be construed as a measure of adverse economic impacts. . . . [T]he Region contends that an accurate cost-effectiveness for the SCR option is well within the range of reasonable costs for controlling NOx from the Wartsila engines. Early in the process, the Region informed ADEC that a reasonable cost-effectiveness of controlling NOx emissions from similar sources would be no greater than $10,000 per ton of NOx removed . . . .
>
> [T]he cost-effectiveness [in this case] is well within the range that the EPA considers reasonable and nothing in the [Revised Report] demonstrates to EPA that the cost-effectiveness is unreasonable.

COM 50-004. The letter also attached the same table that the National Park Service had provided, listing worldwide applications of SCR. COM 50-014 through 50-020. Again, countering ADEC's reliance on prior BACT decisions as a rational basis for rejecting SCR, EPA stated that

> Cost-effectiveness was not calculated in previous BACT determinations in which SCR was required on engines under the top-down BACT analysis because the companies did not argue that the technology should be rejected due to economic considerations. . . .

COM 50-004. The fact that so many installations of SCR exist was important to my recommendation (which was accepted by the Region) that SCR is economically feasible for this type of application, absent unusual site-specific circumstances.

32. Also, in the September 1999 letter, EPA explained that

> Cominco has not adequately demonstrated site-specific factors to support [its] claim that the installation of [selective catalytic reduction] is economically infeasible at the Red Dog Mine. . . .
>
> [I]n order to justify economic infeasibility, the Region believes that the economic impact analysis conducted in the draft permit should have gone beyond a review of cost effectiveness to include an analysis of whether requiring Cominco to install and operate the more effective control strategies would have any adverse economic impact upon Cominco specifically.

COM 50-004, 50-005. In conclusion, EPA summarized its view that

> the permit limits for the Warsila engines for NOx emissions contained in the PSD [revised proposed] permit are clearly erroneous and the BACT analysis for . . . . MG-5 and MG-17 clearly indicates that selective catalytic reduction is the control technology of choice. . . . The BACT analyses are deficient in that they fail to reach conclusions that are supported by the PSD regulations, procedures or available information.

COM 50-009. EPA, therefore, again "urge[d] ADEC to delay issuance of the PSD permit to Cominco until the permit complies with the Clean Air Act." COM 50-001.

33. On October 21, 1999, I and other representatives from EPA, including Region 10's Deputy Administrator, traveled to Anchorage, Alaska to meet with ADEC and Cominco. Following the meeting, the parties engaged in several phone conversations and exchanged correspondence. With regard to BACT on Cominco's MG-17 generator, these communications involved both EPA's authority to take issue with ADEC's decision and our conclusion that ADEC's selection of Low NOx was clearly erroneous. COM 51, COM 53, COM 56.

34. With respect to ADEC and Cominco's challenge to EPA's statutory authority, EPA explained to them in a letter dated November 10, 1999, that

> EPA has a statutorily mandated role in the PSD permitting process in Alaska and in the rest of the nation . . . .
>
> Section 167 of the [CAA], 42 U.S.C. § 7477, provides EPA with the authority to act in precisely this kind of situation. Specifically, Section 167 provides that the Administrator shall take such measures, including issuance of an order, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of Part C of the [CAA]. Additionally, it is the Agency's policy that when a regional office determines that a permitting authority is likely to grant an improper permit, the appropriate response is to issue a section 167 order demanding that the permit not be issued. In this instance, because the proposed permit would allow Cominco to construct a major source without requiring BACT it is entirely appropriate for EPA to exercise its statutory authority. . . . [T]here is no relevant case law supporting the proposition that EPA's involvement prior to the issuance of the PSD permit is inappropriate.

COM 55-001 (Attach. N) (which also can be found at RER, Tab 17).

35. EPA also specifically addressed the issue of whether SCR is economically feasible:

> ADEC's own analysis supports the determination that BACT is SCR, which renders ADEC's decision in the proposed permit erroneous.
>
> As we discussed at the meeting, EPA does not believe that the cost effectiveness stated in the [Revised Report] indicates that the installation of SCR is economically infeasible. These costs are well within the range of costs EPA has seen permitting authorities nationwide accept as economically feasible for NOx controls except where there are compelling site specific factors that indicate otherwise. Furthermore, in the [Preliminary Report] ADEC indicated the costs for SCR were "well within" what ADEC considers economically feasible (preliminary [report] at p. 41). The ADEC's record does not support its change in its decision as stated in the [Revised Report] that SCR is not economically feasible.

COM 55-002.

36. Additionally, EPA addressed ADEC's concern about the precedential effect of requiring SCR in Cominco's permit on rural Alaskan utilities:

> ADEC has expressed its concern that if SCR is required at Cominco, then SCR would automatically be required for new or modified engines at rural electric utilities. The concern is understandable given the essential nature of the service provided by the rural utilities in Alaska. We share your concern regarding the cost of electricity in rural Alaska and the impact of those costs on the rate payers. In accordance with EPA guidance and case law, BACT determinations are made based on individual con-

> sideration of the specific facts and circumstances at the facility being permitted. . . . The significant and unique local factors associated with rural electric utilities serving small Alaskan communities would be specifically analyzed in any BACT determination involving the rural utility. We are currently reviewing such an analysis for Nome Joint Utility System (NJUS) and have provided you with a letter regarding that proposed permit . . . . As noted in the letter on NJUS, [its] status as a non-profit, isolated public utility, influences how those "other costs" [CAA section 169(3)] are considered in determining BACT.

COM 55-002.

37. I note that EPA's initial concerns about BACT on MG-5, one of Cominco's existing generators, were resolved shortly after the October 1999 meeting among the parties. In short, Cominco decided to retrofit its existing generators MG-1, 3, 4 and 5 with Low NOx -- allowing it to obtain a sufficient increase in power generation and yet keep these existing generators' net increase in NOx emissions from being subject to BACT review. COM 55-002, 55-003; From this point on, EPA focused our concerns on ADEC's BACT determination for the MG-17 generator.

EPA's Finding and Order to ADEC, and ADEC's Final Permit

38. By December 1999, as explained above, EPA had extensively reviewed ADEC's record and analysis to see if its BACT determination was consistent with the Clean Air Act and the federally approved Alaskan state implementation plan.

39. In spite of a number of discussions between Region 10's Deputy Regional Administrator and the ADEC Commissioner, the agencies reached an impasse. EPA asserted throughout the discussions, and to date, that the State had not

adequately justified the selection of low NOx controls as the required BACT technology. Because the permit contained an emission limit for the MG-17 generator based on Low NOx, without adequate justification to demonstrate that Low NOx constituted BACT in this case, the permit was not in compliance with Part C of the Clean Air Act (the PSD requirements) or with the Alaska SIP.

40. Section 167 of the Clean Air Act, 42 U.S.C. § 7477, provides that the Administrator shall take such measures, including issuance of an order, as necessary to prevent the construction or modification of a major permitting facility which does not conform to the requirements of Part C of the Act. Section 113(a)(5) of the CAA, 42 U.S.C. § 7413(a)(5), provides that if on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement, it may, among other things, issue an order prohibiting the construction or modification of the source at issue. Thus, the Act provides authority for EPA involvement when necessary to prevent the construction or modification of a facility that does not satisfy the requirements of the Act. It is Agency policy that when a regional office determines that a permitting agency is likely to grant an improper permit, the appropriate response is to issue a Section 167 Order prohibiting the issuance of the permit, or, if the permit has already been issued, to prohibit the construction of the major source until a valid permit is issued. In this instance, because the permit would allow Cominco to construct a major source without requiring BACT controls, EPA decided that it was entirely appropriate for EPA to exercise its statutory authority to prevent the construction of the MG-17 generator.

41. On December 10, 1999, EPA issued a Finding of Noncompliance and Order to ADEC barring issuance of the permit with BACT limits for the MG-17 generator based on Low NOx (unless ADEC could demonstrate that Low NOx was BACT). The cover letter to the finding and order

explained "EPA's assessment that the permit as currently drafted [the September 1999 revised proposed permit and report] does not comply with the PSD provisions of the [CAA] or the Alaska [SIP]." COM 1-001 (Attach. O). First, EPA explained its statutory authority:

> [W]hile ADEC retains the permitting authority over the PSD program in the State of Alaska, EPA retains federal oversight as part of its responsibility to ensure national consistency. Thus, EPA will continue to review nationally significant issues and will review a State permitting decision on a case-by-case basis when appropriate. Sections 113 and 167 of the Act provide EPA with the authority and responsibility to act in precisely this type of situation. Accordingly, the enclosed Finding and Order is issued under the authority of sections 113 and 167 of the [CAA], 42 U.S.C. §§ 7413 and 7477.

In the Finding and Order, after quoting sections 113(a)(5) and 167 of the Act, EPA further explained that

> A State does not conform to the requirements of Part C of the Act [the PSD provisions] if, among other things, it allows a major emitting facility to commence construction or modification prior to receipt of a PSD permit or issues a PSD permit to a facility without subjecting the facility to BACT for each pollutant . . . .

COM 1-009 (¶ 22).

42. EPA then pointed out its factual basis for its conclusion that "ADEC's decision in the proposed permit . . . is both arbitrary and capricious":

> ADEC's own analysis supports the determination that BACT is selective catalytic reduction (SCR) . . . . The State's analysis as reflected in both the preliminary and [September 1999 Revised] technical analysis reports indicates that SCR is technically feasible. Furthermore,

> contrary to ADEC's final conclusions, the State's record reflects that the cost-effectiveness and the collateral issues of energy, environmental, or economic impacts, and other costs, do not justify failure to select SCR as BACT in this case. EPA does not believe that the cost-effectiveness analysis in the [Revised Report] demonstrates that the installation of SCR is economically infeasible. These costs are well within the range of costs EPA has seen permitting authorities nationwide accept as economically feasible for NOx control, except where there are compelling site-specific factors that indicate otherwise. Additionally, in the preliminary [Report], p. 41, ADEC indicated the costs for SCR were "well within" what ADEC considers economically feasible. ADEC's record simply does not support its decision that BACT for . . . MG-17 is low NOx controls rather than SCR.

COM 1-002. Similarly, the Finding and Order contains a discussion of the facts. For example, see COM 1-011 (¶ 32); 1-012 (¶¶ 38.b & 39.b).

43. EPA also provided ADEC another opportunity to justify its decision. Specifically, the letter stated:

> In an effort to revolve [sic] the issue regarding BACT for MG-17, we are willing to continue discussions with ADEC and Cominco. . . . We are available to review and consider any additional information or analyses provided by ADEC or Cominco to support a determination that SCR is not BACT for modified or new Wartsila generators at the Red Dog mine facility.

COM 1-002.

44. Later that same day, shortly after receiving the EPA Order, ADEC issued Air Quality Construction Permit No. 9932-AC005 to Cominco that called for emission limits on

the MG-17 generator based on Low NOx rather than SCR. COM 33 (which also can be found at PER 120-233).

45. The Final Report accompanying the December 10, 1999 permit describes the State's rationale for its BACT determination for MG-17. COM 33-028 to COM 33-053 (Attach. P) (which also can be found at PER 028-053). Claiming it followed the "top down" approach, ADEC reiterated that selective catalytic reduction was the most effective technically feasible method to control the NOx emissions from the MG-17 generator. With SCR, MG-17 would emit only 53 tons of NOx per year; with Low NOx, it would emit over 10 times more NOx every year. COM 33-044, 33-045. The Final Report then summarized ADEC's consideration of the collateral factors. The Final Report explained that there is not a compelling case to reject SCR due to adverse environmental concerns, there are no energy considerations that justify rejecting SCR as BACT, and that the cost effectiveness analysis determined it would cost $2,100 per ton of NOx removed. COM 33-048.

46. The Final Report also states that ADEC agrees that its original approach in the Preliminary Report -- to "temper[] the stringency of BACT by crediting [Cominco] with emissions reductions from sources that were not part of the permit action" -- was not proper under "applicable law or guidelines." COM 33-045.

47. ADEC explained, however, that its "foremost consideration" for rejecting SCR in favor of Low NOx on MG-17 was that

> The Red Dog Mine plays a unique and continuing impact on the economic diversity of this region. Therefore, the Department has chosen to consider the direct costs of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts for the foremost consideration to judge economic impacts of SCR. To support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region, [ADEC] has rejected [SCR] based on excessive economic cost–$2.9 million capital cost, with annualized costs approaching $635,000.

COM 33-051. (I note that "$ 2.9 million" appears to be a scrivener's error in light of other references to "$ 2.1 million" like at COM 33-050.)

48. At the same time, the Final Report fails to explain how application of SCR will affect the Red Dog Mine's world competitiveness as it relates to community socioeconomic impacts. In fact, the Final Report states that Cominco has not presented detailed financial information showing the effect of the control cost on the company operation, and therefore "no judgement can be made as to the impact of a $2.1 million control cost on the operation, profitability and competitiveness of the Red Dog Mine." COM 33-050. (Cominco had declined to present the same information to EPA after we requested it at the October 1999 meeting. COM 53-001.) Additionally, and significantly, ADEC did not explain why it now found SCR to be have [sic] an excessive economic cost despite its early record-based conclusion in the Preliminary Report that SCR is economically feasible.

49. Upon my staff's and my personal review and careful consideration of the Final Report and documents provided to EPA by ADEC and Cominco, EPA found that ADEC's decision to reject the most effective technically available control technology remained arbitrary and capricious. Therefore, on February 8, 2000, EPA issued a Notice of Noncompliance to the State of Alaska informing the State and Cominco that the December 10, 1999 Permit No. 9932-AC005 was not in compliance with the Clean Air Act. COM 5 (Attach. Q) (which also can be found at RER, Tab 19). Specifically, EPA stated:

> Based on our review and analysis of the final permit and [technical analysis report], we conclude that both fail to comply with Federal and State PSD requirements. Thus, the State is not in compliance with the Clean Air Act. Please regard this as a formal finding under Section 113(a)(5) of the Clean Air Act.
>
> It is still EPA's position that Cominco must obtain a PSD permit with an adequately supported BACT determination requiring the installation of BACT on MG-17 prior to commencing construction of that unit. Accordingly, pursuant to Sections 113(a)(5) and 167 of the Act, 42 U.S.C. §§ 113(a)(5) and 167, EPA is issuing an Administrative Order to Cominco.

COM 5-002.

50. On April 25, 2000, EPA withdrew the December 10, 1999 Order it had issued to ADEC because, after ADEC issued the permit prohibited by the Order, the Order did not impose any continuing prohibitions or obligations applicable to ADEC. COM 10.

EPA's Order (and Amended Order) to Cominco

51. EPA guidance discusses the approach to take in a situation like the one here (where a state issues an invalid permit or EPA wants to stop construction with a valid permit). Although sections 113(a)(5) and 167 authorize EPA to bring a civil action, in addition to authorizing it to proceed administratively, standard Agency procedure is that "EPA should issue [an order] if it has determined that there is a reasonable chance the source will comply. Otherwise, the Region should move directly to [judicial action]." COM 70-006. That is,

> EPA should normally first issue an administrative order. The Agency should then file a civil action if a violating source does not immediately comply with the order. In

> cases where EPA has good reason to believe that the order would not be obeyed, however, we should file a civil action for injunctive relief immediately, without first issuing an order.

COM 69-004. EPA followed this standard Agency procedure here.

52. On February 8, 2000, after EPA found ADEC's permit to be out of compliance with the CAA and Alaska's SIP, EPA issued Cominco an Administrative Order to prevent the company from constructing the MG-17 generator prior to obtaining a valid PSD permit from ADEC, that is, one with a legally supportable BACT determination. COM 3. In the cover letter, EPA quoted the applicable statutory authorities (sections 113(a)(5) and 167) and explained:

> [ADEC] Permit No. 9932-AC005 issued to Cominco on or about December 10, 1999, which allowed Cominco to commence construction of the Wartsila diesel generator MG-17 at the Red Dog mine facility fails to comply with Part C of the Act, 42 U.S.C. § 7470-7491, as well as the federal implementing regulations and the Alaska [SIP]. Additionally, the permit was issued in violation of the Order issued to ADEC on December 10, 1999. EPA has issued a Finding of Noncompliance and Violation to ADEC under Section 113(a)(5) of the Act, finding that the State of Alaska failed to comply with Part C of the Act, 42 U.S.C. § 7470-7492, as well as the Federal and State implementing regulations when is [sic] issued this permit. Since the permit is invalid as it applies to MG-17, any construction of MG-17 pursuant to ADEC Permit No. 9932-AC005 is not authorized under the Act.

COM 3-002 (Attach. R).

53. By letter dated February 16, 2000, Cominco requested that EPA stay the findings and orders. COM 64, 65.

54. On March 7, 2000, EPA issued an Amended Order to Cominco which vacated and superceded the February 8, 2000 Administrative Order. As amended, the March 7, 2000 Administrative Order did not prohibit Cominco from conducting specified weather-limited construction activities. The Amended Order indicated that Cominco was specifically allowed to continue construction or operation of portions of the Red Dog Mine facility other than the MG-17 generator as authorized by the ADEC December 10, 1999 permit. COM 7 and COM 8. In a cover letter accompanying the amended order, EPA responded to Cominco's contention that EPA was without statutory authority to issue the findings and orders:

> EPA's approval of a State PSD program does not divest the Agency of the duty to continue appropriate oversight to ensure that permitting decisions made by the State are consistent with the requirements of the Act, EPA regulations and the SIP. To the contrary, several sections of the Act expressly provide the Agency with oversight and enforcement authority over State PSD programs that EPA has approved. See sections 113, 167 and 505(b) of the Act.

COM 7-002.

Conclusion

55. For the reasons in the Administrative Record as highlighted above, EPA concluded that ADEC arbitrarily and capriciously selected Low NOx, as opposed to selective catalytic reduction, as the best available control technology to limit emissions of NOx from Cominco's proposed new power generator, MG-17, at the Red Dog Mine in Alaska. EPA issued the findings and orders because ADEC's BACT decision was not in compliance with the Clean Air Act and Alaska's state implementation plan, and because those actions were necessary to prevent Cominco from constructing the power generator without the requisite controls.

56. My review of ADEC's record and analysis leads me to conclude that the State's BACT decision in this case was based on an improper, non-statutory political factor. In ADEC's own words, the main reason it selected Low NOx as BACT was "to support" Cominco's operations – even though Cominco did not (and undoubtedly could not) provide any information that its "operation, profitability and competitiveness" would be any different, much less harmed, if it had to install SCR on the MG-17 generator. This case emphasizes the importance of EPA's role in ensuring national consistency and that states exercise their discretion responsibly.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23 day of May, 2001.

/s/

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Respondents.

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QUESTION PRESENTED

Whether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska—which had been delegated permitting authority under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*—in conflict with decisions of this Court and other federal courts of appeals establishing the division of federal-state jurisdiction under the Act and similar statutory programs.

PARTIES TO THE PROCEEDING

Petitioner State of Alaska, Department of Environmental Conservation, and Teck Cominco Alaska, Inc. were petitioners in the Ninth Circuit below. The United States Environmental Protection Agency ("EPA"), and Carol M. Browner and Chuck Clarke in their official capacities as Administrator of the EPA and Regional Administrator of the EPA's Region 10, respectively, were originally named as respondents below. Ms. Browner and Mr. Clarke have since been succeeded by Christie Whitman and L. John Iani, respectively.

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---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 298 F.3d 814 and reproduced in the appendix to the petition for certiorari ("Pet. App.") at 1a. The Ninth Circuit's prior opinion concluding that it had jurisdiction over this case is reported at 244 F.3d 748 and reproduced at Pet. App. 17a. The Ninth Circuit's order requesting supplemental briefing is reproduced at Pet. App. 24a. The orders of the United States Environmental Protection Agency ("EPA") are reproduced at Pet. App. 26a, 38a, and 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 30, 2002. Pet. App. 1a. The petition for certiorari was filed on October 25, 2002, and was granted on February 24, 2003. 123 S. Ct. 1253. The jurisdiction of the Ninth Circuit was based on 42 U.S.C. § 7607(b)(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 165(a)(4) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, provides, in pertinent part:

> (a) Major emitting facilities on which construction is commenced. No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
>
> (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this [Act] emitted from, or which results from, such facility * * *. [42 U.S.C. § 7475(a)(4).]

Section 169(3) of the CAA provides, in pertinent part:

> (3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this [Act] emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *. [42 U.S.C. § 7479(3).]

These and other pertinent statutory and regulatory provisions are reproduced in full in the addendum hereto.

INTRODUCTION

Described as an "experiment in federalism," *Michigan* v. *EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (quotation omitted), the Clean Air Act ("CAA") assigns to the States an important—indeed *primary*—role in air pollution prevention and control. One of the States' principal responsibilities under the Act is to prevent the degradation of air quality in those areas where national clean air standards have been attained. To this end, the CAA prohibits the construction or modification of a "major emitting facility" in any attainment area unless the facility is subject to the "best available control technology," or "BACT." 42 U.S.C. § 7475(a)(4). BACT is defined in the CAA as "an emission limitation based on the maximum degree of reduction of each [regulated] pollutant * * * which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *." *Id.* § 7479(3) (emphasis added). The "permitting authority" in this case—and in most cases arising under this provision—is the State. *See* Pet. App. 3a.

The CAA by its terms thus gives the States the authority to determine BACT for a particular source, and allows the States broad discretion in making that determination. This is confirmed by the Act's legislative history: "The decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility *with the State*, to be determined in a case-by-case judgment. It is recognized that the phrase has *broad flexibility* in how it should and can be interpreted, depending on site." S. Rep. No. 95-127, at 31 (1977) (emphases added).

In this case, the State of Alaska issued a permit for the construction of a new electric generator at the Red Dog Mine, located in Northwest Alaska some 100 miles north of the Arctic Circle. In accordance with the CAA and the State's own regulations, the State determined that a particular

technology—"Low NOx"—was BACT to control nitrogen oxide emissions from the new generator. In making that determination, the State spent eighteen months engaged in the permitting process—with required public comment and review—and prepared extensive technical analyses specifically considering alternative technologies and their associated "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). *See* J.A. 159-224. The State considered but rejected an alternative technology—Selective Catalytic Reduction ("SCR")—primarily due to cost considerations. J.A. 200-208. Nevertheless, the State's decision resulted in emissions levels that complied with all standards promulgated by the EPA. Moreover, because the operator of the mine had agreed to install Low NOx on other generators not subject to BACT review, the State's decision was likely to result in *lower* overall NOx emissions than if the more costly SCR had been selected as BACT for the new generator.

The EPA, however, "disagree[d]" with the State's decision to select Low NOx, rather than SCR, as BACT for the new generator. J.A. 97, 118. Rather than challenge the State's decision through the available state review process, the EPA issued a series of orders prohibiting the construction of the generator. The EPA, however, had no authority to do so. Because BACT is "key" to the States' ability to "manage their allowed internal growth" under the CAA, *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 364 (D.C. Cir. 1980), Congress decided to make the determination of BACT "strictly a State and local decision." S. Rep. No. 95-127, at 31. Nothing in the Act gives the EPA the authority to override a State's discretionary judgment as to what constitutes BACT for a particular source.

The EPA has the authority to issue orders to enforce any "requirement" of the Act, *see* 42 U.S.C. §§ 7413(a)(5), 7477, but the only pertinent "requirement" here is that the state-issued permit contain a BACT limitation, set by "the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." *Id.* § 7479(3). There is no dispute that the permit at issue here contains such a limitation, and no dispute that the limitation was determined by the State after considering the applicable factors. *See* J.A. 157-158; 200-211. The EPA disagrees with the State's determination in this particular instance, and would set a different BACT limitation, but that does not mean that the State in any sense violated a "requirement" of the Act in issuing the permit with the BACT limitation that it—"the permitting authority"—had selected. The EPA's contrary view plainly usurps authority that the CAA vests with the States, upsetting the balance of power that Congress carefully sought to establish under the Act. Because the Ninth Circuit below erred in sanctioning that result, the judgment below should be reversed.

STATEMENT OF THE CASE

Statutory and Regulatory Background. The CAA establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that "air pollution prevention * * * and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id.* § 7407(a) ("Each State shall have the *primary* responsibility for assuring air quality within the entire geographic area comprising such State") (emphasis added). Thus, while the CAA assigns the EPA the responsibility for establishing national ambient air quality standards ("NAAQS") for certain pollutants, *see id.* § 7409, the Act assigns the States the responsibility for implementing them. *See id.* §§ 7407(a), 7410(a).

To this end, the CAA requires each State to adopt and submit for the EPA's approval a state implementation plan

("SIP") that provides for the attainment and maintenance of the NAAQS. *See id.* § 7410(a). If a State does not have an approved SIP in place, the Act requires the EPA to adopt and implement a federal implementation plan. *See id.* § 7410(c). The EPA may delegate to a State the authority to implement and enforce any part of such a federal plan. *Id.* § 7410(c)(3).

Areas of the country "that meet[] the [NAAQS] for a [given] pollutant" (attainment areas) or for which insufficient information exists to determine whether the NAAQS have been met (unclassifiable areas) are known as "clean air" areas. *Id.* § 7407(d)(1)(A)(ii), (iii).[1] The CAA establishes maximum allowable increases (or increments) of certain pollutants in such clean air areas. *Id.* § 7473; *see* 40 C.F.R. § 51.166(c) (establishing increment for nitrogen dioxide). To ensure in part that those increments are not exceeded, the Act requires that each SIP contain emission limitations and such other provisions as may be necessary "to prevent significant deterioration of air quality" in clean air areas, including a Prevention of Significant Deterioration ("PSD") permit program. *Id.* §§ 7410(a)(2)(C), 7471. The Act provides that no "major emitting facility" may be constructed or modified in a clean air area without a PSD permit. *Id.* § 7475(a)(1).

The Act also provides that no major emitting facility may be constructed or modified unless "the proposed facility is subject to the best available control technology [or "BACT"] for each pollutant subject to regulation under [the Act]

[1] Clean air areas are divided into three categories: (1) class I areas, which include certain national parks and wilderness areas; (2) class II areas, which are intended to accommodate "moderate" growth; and (3) class III areas, which are intended to accommodate "intensive major industrial growth." *See* 42 U.S.C. §§ 7472, 7474(a); H.R. Rep. No. 95-294, at 152-153 (1977). The Red Dog Mine is located in a class II area; Alaska has no class III areas. *See* 18 Alaska Admin. Code § 50.015(c)(2).

emitted from, or which results from, such facility." *Id.* § 7475(a)(4). BACT is defined as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *. [*Id.* § 7479(3) (emphasis added).]

As the legislative history of the Act's PSD provisions makes clear, the determination of BACT is "key" to a State's ability to manage "growth" within its borders. S. Rep. No. 95-127, at 31 (1977). For this reason, Congress "place[d] this responsibility *with the State*, to be determined in a case-by-case judgment." *Id.* (emphasis added). "It is recognized that the phrase has *broad flexibility* in how it should and can be interpreted, depending on site." *Id.* (emphasis added). The "flexible approach" adopted by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as *anticipated and desired economic growth for the area*." *Id.* (emphasis added). The determination of BACT is "strictly a State and local decision"—"[f]lexibility and State judgment are [its] foundations." *Id.*

The Red Dog Mine. For generations, Inupiat Eskimos hunting and fishing in the DeLong Mountains in Northwest Alaska had been aware of orange- and red-stained creekbeds in which fish could not survive. In the 1960s, a bush pilot and part-time prospector by the name of Bob Baker noticed striking discolorations in the hills and creekbeds of a wide valley in the western DeLongs. Unable to land his plane on the rocky tundra to investigate, Baker alerted the U.S. Geological Survey. Exploration of the area eventually led to

the discovery of a wealth of zinc and lead deposits. Although Baker died before the significance of his observations became known, his faithful traveling companion—an Irish Setter who often flew shotgun—was immortalized by a geologist who dubbed the creek Baker had spotted "Red Dog" Creek. Mark Skok, *Alaska's Red Dog Mine: Beating the Odds*, Minerals Today, at 8 (June 1991).

In 1980, Congress set aside the Red Dog Creek area pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601 *et seq.*, for selection by the Northwest Arctic Native Association ("NANA")—a regional Native corporation established pursuant to ANCSA for the benefit of the Inupiat in Northwest Alaska. *See* Alaska National Interest Lands Conservation Act, Pub. L. 96-487, § 1418, 94 Stat. 2371, 2501-02 (1980); S. Rep. No. 96-413, at 258-259 (1979). NANA decided to lease the land for mineral development. In 1982, NANA entered into a partnership agreement with Teck Cominco Alaska, Inc. ("Cominco") to develop and operate what would become the Red Dog Mine. Skok, *supra*, at 8-9.

The Red Dog Mine, now the world's largest source of zinc concentrate, is located about 100 miles north of the Arctic Circle.[2] The remote and sparsely populated area is "one of the * * * harsh[est] and [most] inaccessible regions on earth." Skok, *supra*, at 6. No roads connect its eleven communities to each other or the outside world. From late May, when the ice on the rivers breaks, until October, boats are the area's main mode of transportation. Neal Fried & Brigitta Windisch-Cole, *A Profile: Northwest Arctic Borough*, Alaska Economic Trends, Vol. 19, No. 1, at 3 (Jan. 1999). In the winter, temperatures can drop to nearly ninety degrees below

[2] Zinc is an anti-corrosive galvanizing agent used, among other things, in the manufacture of steel items ranging from nails and pipes to automobile bodies and bridge girders. Skok, *supra*, at 7.

zero (with average lows of about fifteen below), and the region is enveloped in darkness both night and day.

Operating 365 days a year, 24 hours a day, the Red Dog Mine is the largest private employer in the Northwest Arctic Borough, an area roughly the size of the State of Indiana with a population of about 7,000. J.A. 207. The vast majority of the area's residents are Inupiat Eskimos whose ancestors have inhabited the region for thousands of years. Fried & Windisch-Cole, *supra*, at 4, 7. The region offers only limited year-round employment opportunities, particularly in the private sector; in the two years preceding Alaska's permit decision, the borough's unemployment rate was the highest in the State. J.A. 207.

The partnership agreement between NANA and Cominco provides for the training and employment of a local workforce, with caps on annual production to ensure long-term employment opportunities for the region. The agreement also provides for a committee of local Inupiat elders to oversee mining operations. The committee is authorized, for instance, to close the mine's road to protect migrating caribou. Royalty payments to NANA and its Inupiat shareholders—to be shared in part with all other Alaska Native corporations—are expected to total about $1 billion over the life of the mine. Skok, *supra*, at 7, 8-9. With nearly 600 workers, the mine's payroll represents over a quarter of the borough's wage base. Prior to the mine's opening, the average wage in the borough was well below the state average; a year after its opening, the borough's average exceeded that of the State. Fried & Windisch-Cole, *supra*, at 6.

Alaska's Permit Decision. The State of Alaska has been designated an attainment or unclassifiable area with respect to nitrogen dioxide, a regulated pollutant for which NAAQS have been established. *See* 40 C.F.R. §§ 50.11, 81.302; Pet. App. 3a. Alaska's SIP contains a PSD permit program,

approved by the EPA in 1983, which the State operates through its Department of Environmental Conservation ("ADEC"). *See* 40 C.F.R. § 52.96(a); Pet. App. 3a. Before a PSD permit will be issued for the construction of a new source within the State, Alaska's SIP requires "a demonstration that [a] proposed limitation represents the best available control technology for each air contaminant and for [the] source." 18 Alaska Admin. Code § 50.310(d)(3).[3]

Operating the Red Dog Mine in the harsh landscape of Northwest Alaska is not without its challenges. For instance, because no public utility serves the area in which the mine is located, the mine must generate its own electricity. J.A. 135. Currently, the mine is powered by six diesel-fired electric generators, designated "MG-1" through "MG-6," which were constructed pursuant to PSD permits issued by ADEC in 1988 and 1994. J.A. 166.

In April 1996, Cominco initiated a production rate increase ("PRI") project to boost the mine's output—and in the process create nearly 100 new jobs. Because the PRI project required the use of more electricity, Cominco in June 1998 submitted an application to ADEC for a new PSD permit, requesting, among other things, permission to increase emissions of nitrogen oxide ("NOx"), a precursor to nitrogen dioxide, from its MG-5 generator. Cominco's application proposed the use of "Low NOx"—a process that reduces NOx emissions by 30%—as BACT for the MG-5 generator. J.A. 191. In April 1999, Cominco amended its application, proposing to install Low NOx on all six of its existing generators—including the five not subject to BACT review—as well as on a proposed new generator, "MG-17,"

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[3] Alaska's SIP likewise defines "best available control technology" as "the emission limitation that represents the maximum reduction achievable for each regulated air contaminant, taking into account energy, environmental and economic impacts, and other costs." 18 Alaska Admin. Code § 50.990(13).

which, like MG-5, would be subject to BACT review. *See* J.A. 84.

In May 1999, ADEC issued a draft PSD permit and a preliminary Technical Analysis Report ("TAR") in which it accepted Cominco's amended proposal because it would reduce *total* NOx emissions from the seven generators to a level at least comparable to, and probably even *lower* than, that which would result were another control alternative evaluated during ADEC's review process—SCR—installed on only the MG-5 and MG-17 generators. J.A. 85-88. ADEC published the draft PSD permit and preliminary TAR for public comment and review.

The National Park Service filed comments, objecting to what it called Cominco's "unusual approach" and recommending that ADEC instead require SCR for all the generators, even those not subject to BACT review. In July 1999, after the close of the public comment period, *see* J.A. 248, the EPA commented on Cominco's application for the first time. The EPA stated that it "disagree[d]" with ADEC's BACT determination and believed instead that "SCR [was] BACT" for the MG-5 and MG-17 generators, J.A. 97—even though SCR had never before been determined to be BACT to reduce NOx emissions from a similar type of diesel-fired electric generator. *See* J.A. 142. In September 1999, after considering all public comment—including the EPA's belated input—ADEC issued a final draft permit and final draft TAR concluding that SCR was not economically feasible and that Low NOx was BACT for the MG-5 and MG-17 generators. *See* Pet. App. 5a. ADEC's final analysis, unlike the preliminary report, did not rely on emissions savings from the other generators in reaching this conclusion. J.A. 111-112.

In response to the EPA's continuing objections to ADEC's BACT determination, ADEC worked with the agency in an effort to resolve their disagreement. J.A. 197. Although the

dispute over BACT for the MG-5 generator was resolved when Cominco decided to restrict emission increases from the generator so as to avoid triggering BACT review, the parties could not agree on BACT for the proposed new generator, MG-17. *Id.*

After a period of unsuccessful negotiations, ADEC on December 10, 1999 issued the PSD permit and final TAR, in which ADEC spent nearly ten pages explaining the basis of its determination that Low NOx was BACT for the MG-17 generator. *See* J.A. 197-211. It is undisputed that ADEC's permit decision did not violate the NAAQS, the allowable PSD increments, or any other applicable emissions standard. Moreover, although not required by law to do so, ADEC followed the EPA's "top-down" approach—used in determining BACT by the EPA when it acts as the PSD permitting authority in those States that do not administer a PSD program.[4] Under that approach, ADEC (1) identified all NOx control technologies; (2) identified which technologies were technically feasible; (3) ranked the technically feasible control technologies in order of effectiveness; (4) considered the "energy, environmental, and economic impacts and other costs" of the technically feasible technologies, *see* 42 U.S.C. § 7479(3), and determined which to eliminate based on such impacts; and (5) selected Low NOx as the most effective technology not eliminated. *See* J.A. 197-211.

In specifically considering the "energy, environmental, and economic impacts and other costs" associated with SCR, ADEC discounted Cominco's contention that requiring SCR as BACT would have significant adverse environmental and energy impacts. J.A. 200-203. ADEC concluded, however,

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[4] As even the EPA has acknowledged, "top-down analysis is not a mandatory methodology." EPA 9th Cir. Br. 12 (quotation omitted). "Apart from the statutory criteria, neither EPA's regulations nor Alaska's SIP contains detailed procedures for determining what technology is BACT for a particular source." *Id.*

that SCR would have adverse economic impacts. To begin with, the cost of SCR to reduce NOx emissions from the MG-17 generator was "outside the range of costs being borne by similar sources under recent BACT determinations," J.A. 204—indeed, more than twice as costly per ton of NOx removed as the most expensive technology previously determined by ADEC to be BACT to reduce NOx from similar sources. J.A. 205-206. Because the mine generates all its own power—and thus acts as its own electric utility—ADEC also considered whether the costs of SCR for the MG-17 generator would be excessive for a rural Alaska utility. The cost of imposing SCR "would be equivalent to a 20% increase in the electric rate of the facility," which ADEC concluded would be a "disproportionate cost increase" for a utility and thus, by analogy, for a mine compelled to furnish its own power. J.A. 206.

Recognizing the mine's "unique and continuing impact" on the regional economy of the Northwest Arctic Borough, ADEC determined that in light of SCR's "excessive economic cost," J.A. 208—$2.9 million in capital costs with annual operating costs approaching $635,000—SCR was not economically feasible and that Low NOx was BACT for the MG-17 generator. J.A. 208, 211. Yet because Cominco had agreed to install Low NOx on *all* its generators, ADEC's permit decision was expected to result in *lower* overall NOx emissions than would occur if SCR—the EPA's preferred technology—were installed on only the MG-17 generator. *See* J.A. 85-87.

The EPA's Orders. In an attempt to prevent ADEC from issuing the final PSD permit to Cominco, the EPA on December 10, 1999, issued a finding of noncompliance and order to ADEC. Pet. App. 26a. According to the EPA, the final draft permit designating Low NOx as BACT for the MG-17 generator did not comply with the requirements of the CAA or Alaska's SIP relating to the construction or modification of new or existing sources. Pet. App. 36a. The

EPA ordered ADEC to withhold issuance of the final PSD permit—or, in the event that ADEC had already issued the permit, to "retract or render it ineffective"—until ADEC "satisfactorily document[ed] why SCR is not BACT for the [MG-17] generator" or otherwise demonstrated that the permit was in compliance with the CAA and Alaska's SIP. Pet. App. 36a-37a.

The EPA purported to issue its finding and order under Sections 113(a)(5) and 167 of the CAA. Pet. App. 26a. Section 113(a)(5) provides that whenever the Administrator "finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources," the Administrator "may issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies." 42 U.S.C. § 7413(a)(5). Section 167 provides that the Administrator "shall * * * take such measures, including issuance of an order, * * * as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of [the PSD provisions]." *Id.* § 7477.

On February 8, 2000, the EPA reiterated its finding against the State, J.A. 258, and issued an order to Cominco prohibiting the construction of the MG-17 generator until Cominco obtained a "valid" PSD permit from ADEC that complied with the CAA and the EPA's December 10, 1999 finding and order. Pet. App. 49a. Subsequently, on March 7, 2000, the EPA amended its February 8, 2000 order to allow Cominco to perform certain preliminary seasonal construction activities. Pet. App. 62a-63a. The amended order reiterated that Cominco was otherwise prohibited from commencing construction of the MG-17 generator. Pet. App. 62a.[5]

[5] On April 25, 2000, the EPA withdrew the "Order portion" of the December 10, 1999 Finding of Noncompliance and Order against ADEC. Pet. App. 19a (quotation omitted). The EPA specifically noted that it was withdrawing "only the Order portion," and that the "December 10, 1999 and February 8, 2000 Findings under Section [113(a)(5)] remain unchanged * * *." *Id.* (quotation omitted).

Proceedings Below. ADEC and Cominco subsequently petitioned for review of the EPA's finding of noncompliance and orders in the Ninth Circuit. *See* Pet. App. 1a. ADEC and Cominco argued that the EPA had no authority to issue the findings and orders under either Section 113(a)(5) or Section 167, because ADEC had not violated any "requirement" of the Act. To the contrary, they explained, ADEC had properly exercised its authority under the Act to "determin[e]" BACT on a "case-by-case basis," after taking the statutory factors into account. 42 U.S.C. § 7479(3). ADEC and Cominco also argued that, even if the EPA had the statutory authority to overturn a state BACT determination in some instances, the EPA had acted arbitrarily and capriciously in doing so here.

After initially rejecting the EPA's contention that the court lacked jurisdiction to consider the parties' challenges because the EPA's orders did not constitute "final agency action" under 42 U.S.C. § 7607(b)(1), Pet. App. 18a, the Ninth Circuit held in favor of the EPA. The Ninth Circuit concluded that "subjecting a facility to BACT" was a "requirement" under the Act, that "the EPA based its orders on the finding that ADEC had not complied with the BACT requirement," and that the orders therefore were authorized by Sections 113(a)(5) and 167. Pet. App. 9a.

Addressing ADEC and Cominco's contention that the EPA lacked the authority to veto ADEC's discretionary judgment based on its difference of opinion as to which technology was BACT, the Ninth Circuit stated that "[n]othing in the BACT definition of Section 169(3) limits the EPA's authority." Pet. App. 11a. In its view, the Act places only "*initial* responsi-

bility with the state permitting authority" to determine BACT. *Id.* (emphasis added). *See also* Pet. App. 9a (noting that "ADEC, as the 'permitting authority,' made the *initial* BACT decision") (emphasis added). According to the court, "the EPA has the *ultimate* authority" to decide what constitutes BACT. Pet. App. 10a-11a (emphasis added).

The court then went on to hold that the EPA had not acted arbitrarily or capriciously in invalidating ADEC's permit decision because—the court concluded—ADEC had failed to provide "a reasoned justification for its elimination of SCR as a control option." Pet. App. 16a. First, the court concluded, the final TAR revealed "no recent permit decisions involving BACT determinations for diesel engines used as primary power generators," so ADEC could not determine whether the costs of SCR were "disproportionately high" compared to the costs of controls imposed in other recent decisions. Pet. App. 14a. Second, the court concluded, the final TAR revealed that the cost-effectiveness of SCR was within the range of the cost-effectiveness "of recent NOx control BACT decisions." *Id.* Third, the court ruled, ADEC's determination that the costs of SCR would be " 'disproportionate' " if imposed on a rural utility was irrelevant, because "Cominco does not, in fact, buy power from an electric utility." *Id.* (quoting J.A. 206).

Finally, the court concluded that ADEC's " 'foremost' " consideration in selecting Low NOx as BACT—the " 'direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts,' " Pet. App. 15a (quoting J.A. 208)—was not "an accepted justification" for determining BACT. Pet. App. 16a. In the court's view, ADEC's recognition of the mine's importance to the precarious economy of the Northwest Arctic Borough was "uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority—to protect states from industry pressure to issue ill-advised permits." *Id.*

SUMMARY OF ARGUMENT

I. The CAA is based on a "division of responsibilities" between the States and the federal government. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). Under this scheme of "cooperative federalism," the federal government is responsible for setting national standards to achieve and maintain clean air. The States are charged with the responsibility of setting specific emissions limitations for particular sources to ensure that the national standards are met. In clean air areas, the federal government determines the maximum allowable increases of emissions for certain pollutants; the States decide how to allocate the available increments among competing sources for economic development and growth. Determining BACT for particular sources is a key means by which the States weigh potentially competing demands for pollution control and economic development within the national limits set by Congress and the EPA.

BACT is defined in the CAA as "an emission limitation based on the maximum degree of reduction [of a regulated pollutant] * * *, *which the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility." 42 U.S.C. § 7479(3) (emphasis added). By its terms, the Act squarely places the responsibility for determining BACT with "the permitting authority"—*i.e.*, the State. By specifying that BACT is to be determined "on a case-by-case basis" after considering "energy, environmental, and economic impacts and other costs," the Act makes clear that the BACT decision reflects state policy judgments about how to reconcile competing priorities in the context of a particular permit. Deciding that a more stringent and more costly control is "best" for a particular source may reflect a judgment that the economic benefits of that particular expansion are worth consuming only so much of the available increment; deciding that a less stringent and less

costly control is "best" for a different source may reflect a different judgment about the value of that specific project. Congress intended the State, in determining BACT, "to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as anticipated and desired economic growth for the area." S. Rep. No. 95-127, at 31. Given the nature of these judgments, BACT "is strictly a State and local decision." *Id.*

The Ninth Circuit nevertheless held that the EPA had the "ultimate authority" to decide what constituted BACT in this case. Pet. App. 11a. The court reasoned that because Sections 113(a)(5) and 167 of the CAA give the EPA the authority to enforce any "requirement" of the Act's PSD provisions, *see* 42 U.S.C. §§ 7413(a)(5), 7477, the EPA had the authority to enforce "the BACT requirement" and thus overturn Alaska's permit decision. Pet. App. 9a. The flaw in this reasoning is readily apparent. The only "BACT requirement" pertinent here is that the state-issued permit contain a BACT limitation *determined by the State* after consideration of "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). It is undisputed that the permit issued by Alaska to Cominco contains such a limitation, and that it was set by the State after consideration of the applicable statutory factors. The EPA "disagrees" with the State's determination, J.A. 97, 118, and prefers its own "control technology of choice," J.A. 129, but that does not mean that the State has failed to comply with "the BACT requirement."

Because BACT is a discretionary judgment, involving the "case-by-case" prioritizing and weighing of potentially competing impacts and costs, there is no single, objectively "correct" BACT determination for any particular source. So long as a State does not set a limitation that allows emissions to exceed the national standards established by the federal government, the EPA has no authority to overturn a state

BACT determination that is based on consideration of the applicable factors. Indeed, had Congress intended the EPA to have the "ultimate authority" to decide what constitutes BACT for a particular source, there would have been no need for Congress to explicitly require EPA approval of state BACT determinations in one specified instance not applicable here. *See* 42 U.S.C. § 7475(a)(8).

None of this is to say that there is no cure for the problem the EPA alleges—that the States might make "unreasoned" BACT determinations. In fact, when it reviews proposed state PSD permit programs, the EPA insists they provide adequate administrative and judicial review provisions to guard against just such a prospect. The EPA's recourse in this case was not to unilaterally overturn the State's judgment, but to challenge Alaska's BACT determination through the available state review process. Allowing the EPA to bypass these procedures—as the Ninth Circuit below did—leads to incongruous results. For instance, there is nothing to prevent the EPA from invalidating a State's BACT determination at any time—months, even years, after a permit has issued—undermining the certainty and finality of the permitting process. Moreover, while the *EPA* should be required to demonstrate that the *State*'s decision was arbitrary or capricious, instead it is now the *State* that supposedly must demonstrate that the *EPA*'s action was arbitrary or capricious. The awkwardness of considering whether the EPA was arbitrary or capricious in deciding that the State was arbitrary or capricious should be the canary in the mine shaft, signaling that something is very much amiss.

II. Even if this Court were to conclude that the EPA has some authority to overturn a state BACT determination, the EPA still had no authority to do so here. The EPA's own interpretation of its authority under the CAA is that it may not interfere with a State's BACT determination where the State has provided a "reasoned justification" for its decision. Alaska plainly did so here. After devoting eighteen months

to processing Cominco's permit application, the State issued a final TAR in which it explained the basis of its conclusion that Low NOx was BACT for the MG-17 generator, including its reasons for rejecting SCR—the EPA's preferred technology. ADEC concluded that the cost-effectiveness of SCR was "outside the range of costs being borne by similar sources under recent BACT determinations," J.A. 204, and that SCR would have a "disproportionate" cost impact upon a rural Alaska utility, and thus by analogy upon a mine compelled by site-specific conditions to supply its own power. J.A. 206. Recognizing the "unique and continuing impact" of the Red Dog Mine on the local economy of the Northwest Arctic Borough, ADEC decided not to impose SCR's "excessive economic cost" on Cominco. J.A. 208.

At bottom, the EPA overturned the State's decision not because it believed that Alaska had failed to provide a "reasoned justification" for its BACT determination, but rather simply because the EPA preferred a different technology—SCR. That much is clear from the EPA's December 10, 1999 Finding of Noncompliance and Order itself, which nowhere states that ADEC had not provided a "reasoned justification" for its decision, but instead asserts, as a factual matter, that "SCR is BACT" for the type of generator at issue. Pet. App. 34a. In substituting its judgment for that of Alaska, however, the EPA plainly usurped the State's prerogative to determine BACT "on a case-by-case basis."

ARGUMENT

I. THE EPA HAS NO AUTHORITY UNDER THE CAA TO INVALIDATE A STATE BACT DETERMINATION THAT IS BASED ON CONSIDERATION OF THE STATUTORY FACTORS.

We begin with first principles. The EPA, a federal administrative agency, is "a creature of statute." *Guardians Ass'n* v. *Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 614 (1983) (O'Connor, J., concurring). As such, the EPA

"literally has *no* power to act * * * unless and until Congress confers power upon it." *Louisiana Public Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986) (emphasis added). *Accord Michigan* v. *EPA*, 268 F.3d at 1081 ("if there is no statute conferring authority, a federal agency has none"). Accordingly, "[i]f EPA lacks authority [to take particular action] under the Clean Air Act, then its action is plainly contrary to law and cannot stand." *Michigan* v. *EPA*, 268 F.3d at 1081. *See also* 5 U.S.C. § 706(2)(C).

The Ninth Circuit held that the CAA gives the EPA the "ultimate authority" to decide what constitutes BACT for a particular source. Pet. App. 11a. In its view, that conclusion is "compel[led]" by the plain language and legislative history of the Act. Pet. App. 7a. As we explain below, however, the plain language and legislative history of the CAA make clear that BACT is a determination to be made by the States, and the EPA has absolutely *no* authority to second-guess a State's BACT determination that—like Alaska's here—is based on consideration of the statutory factors. Because the EPA thus had no authority to invalidate Alaska's permit decision in this case, its action is "plainly contrary to law," and the Ninth Circuit decision below "cannot stand." *Michigan* v. *EPA*, 268 F.3d at 1081.

A. The Plain Language Of The CAA Makes Clear That BACT Is A Determination To Be Made By The States On A "Case-By-Case Basis."

1. The CAA provides that no major emitting facility may be constructed or modified in a clean air area unless "the proposed facility is subject to [BACT] for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility." 42 U.S.C. § 7475(a)(4). BACT is defined in the Act as "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation * * *, *which the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and

economic impacts and other costs, determines is achievable for such facility." *Id.* § 7479(3) (emphasis added).

By its terms, the CAA squarely places the responsibility for determining BACT with "the permitting authority"—*i.e.*, the State. As the plain language of the statute makes clear, a BACT determination is a discretionary judgment, involving the "case-by-case" weighing of several factors—"energy, environmental, and economic impacts and other costs." *Id.* A BACT determination in any given case will thus depend on how the State—"the permitting authority"—chooses to weigh the pertinent factors. Accordingly, the Act not only gives the States the authority to determine BACT for a particular source, but gives them broad discretion to do so.

The Ninth Circuit nevertheless held in this case that the EPA had the "ultimate authority" to invalidate Alaska's BACT determination. Pet. App. 11a. The court reasoned as follows: (1) Sections 113(a)(5) and 167 of the CAA give the EPA the authority to enforce any "requirement" of the Act, *see* 42 U.S.C. §§ 7413(a)(5), 7477; (2) "subjecting a facility to BACT" is a "requirement" of the Act, *id.* § 7475(a)(4); (3) the EPA found that the State had not complied with "the BACT requirement"; and (4) therefore, the EPA's invalidation of Alaska's BACT determination was authorized "by the plain language" of Sections 113(a)(5) and 167. Pet. App. 7a-9a.

The court's reasoning, however, is fundamentally flawed. The only "BACT requirement" pertinent here is that a state-issued PSD permit contain a BACT limitation, determined by the State "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). There is no dispute that the permit issued by Alaska to Cominco contains such a limitation, *see* J.A. 157-158, or that the limitation was set by the State after considering the applicable factors. J.A. 200-211. Thus, Alaska fully complied with "the BACT requirement,"

Pet. App. 9a, and the EPA had no authority under Section 113(a)(5) or Section 167 to override its decision. The EPA "disagrees" with Alaska's decision, J.A. 97, 118, and regards SCR as "the control technology of choice," J.A. 129, but that does not mean that the State has in any sense violated a "requirement" of the Act.

There are many "requirements" in the Act, including in the PSD provisions, that the EPA may enforce pursuant to Sections 113(a)(5) or 167. The CAA provides that a facility's emissions may not exceed the NAAQS, PSD allowable increments, or other applicable emission standards. *See* 42 U.S.C. § 7475(a)(3). The provision defining BACT itself, while specifying that BACT is determined by "the permitting authority," goes on to provide that "[i]n no event" may application of BACT result in emissions exceeding any performance standards promulgated by the EPA or any limits on hazardous pollutants. *See id.* § 7479(3). Other requirements are that a PSD permit be issued in the first place; that the proposed permit be subject to review and required analysis; and that interested persons—including "representatives of the Administrator"—be given an opportunity to submit written or oral presentations. *See id.* §§ 7475(a)(1), (2).

Should a State violate any of these requirements or prohibitions, the EPA may take appropriate action pursuant to Sections 113(a)(5) or 167. Such objective requirements, however, stand in sharp contrast to the determination of what BACT is for a particular source. BACT is a discretionary judgment based on the case-by-case weighing of the applicable statutory factors. Accordingly, there is no single, objectively "correct" BACT determination for any particular source—no "technology of choice" that applies without regard to case-specific policy judgments about how to balance competing impacts and costs.

For example, one State—experiencing little economic growth in the pertinent area and concerned about the impact of increased costs on a critically important employer—may select as BACT for that employer a less stringent and less costly technology that results in emissions consuming nearly all of (but not more than) the available increment for growth. Another State—experiencing vigorous economic growth and faced with many competing permit applications—may select as BACT for those applications a more stringent and more costly technology that limits the impact of any particular new source on the increment available for development. A third State—in which ecotourism rather than more industrial development is the priority—may select as BACT an even more stringent and more costly technology, effectively blocking *any* industrial expansion. In each case the State would have determined the maximum degree of pollution reduction achievable for the facility in question, given the priorities of the particular State and that State's decision about how to implement those priorities in the case of that particular facility. *See* S. Rep. No. 95-127, at 31 ("flexible approach" in determining BACT "allows the States * * * to judge how much of the defined increment of significant deterioration will be devoted to any major emitting facility").

Determining the "best" control technology is like asking different people to pick the "best" car. Mario Andretti may select a Ferrari; a college student may choose a Volkswagen Beetle; a family of six a mini-van. A Minnesotan's choice will doubtless have four-wheel drive; a Floridian's might well be a convertible. The choices would turn on how the decisionmaker weighed competing priorities such as cost, mileage, safety, cargo space, speed, handling, and so on. Substituting one decisionmaker for another may yield a different result, but not in any sense a more "correct" one. So too here. Because there is no "correct" BACT determination for any particular source, the EPA cannot conclude that a State failed to include the "correct" BACT limitation in a

PSD permit, the way the EPA can conclude, say, that the State failed to require a PSD permit, that the State failed to include a BACT limitation at all in a PSD permit, or that the State issued a permit allowing emissions to exceed available increments.

The Ninth Circuit's erroneous conclusion proceeded from a faulty premise—that the State is only the "initial" BACT decisionmaker under the Act. *See* Pet. App. 11a ("It does not follow from the placement of *initial* responsibility with the state permitting authority that its decision is thereby insulated from the oversight and enforcement authority assigned to the EPA") (emphasis added); Pet. App. 9a ("ADEC, as the 'permitting authority,' made the *initial* BACT decision") (emphasis added). There is absolutely nothing in the CAA, however, that supports that notion. The statute expressly provides that "*the permitting authority*, on a case-by-case basis," shall determine BACT for a particular source. 42 U.S.C. § 7479(3) (emphasis added). Except in one specified instance—not applicable here—the Act nowhere requires the EPA to approve a State's BACT determination. *See id.* § 7475(a)(8).

Indeed, that one instance is the exception that proves the rule—that Congress otherwise did not intend the EPA to have the "ultimate authority" to determine BACT for particular sources. Pet. App. 11a. Section 165(a)(8) of the Act requires EPA approval of state BACT determinations for sources "in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area where no standard under [42 U.S.C. § 7411] has been promulgated * * * for such source category." 42 U.S.C. § 7475(a)(8). Thus, when Congress wanted to require EPA approval of a state BACT determination, it did so explicitly. *See, e.g., Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452-453 (2002) ("Where Congress wanted to provide for successor liability in the Coal

Act, it did so explicitly, as demonstrated by other sections in the Act").[6]

2. Congress's decision to make the States—and not the EPA—the arbiters of BACT is consistent with its overall approach under the CAA. Like numerous other federal statutory schemes, the CAA is based on the principle of "cooperative federalism." *See, e.g., New York* v. *United States*, 505 U.S. 144, 167-168 (1992) (citing examples). Such statutory schemes "allow[] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, *structured to meet their own particular needs*." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (emphasis added).

In recognizing the Act's "division of responsibilities" more than twenty-five years ago, this Court observed that the EPA "is plainly charged by the Act with the responsibility for setting the national ambient air standards." *Train*, 421 U.S. at 79. But "[j]ust as plainly," the Court emphasized, the EPA "is relegated by the Act to a *secondary* role in the process of determining and enforcing the *specific, source-by-source*

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[6] Indeed, when Congress wanted to give the EPA *any* kind of role at all in the PSD permitting process, it did so explicitly. Section 165(a)(2), for instance, specifies that "interested persons" who may submit comments on a proposed permit include "representatives of the Administrator." 42 U.S.C. § 7475(a)(2). In a similar vein, Section 165(d) provides the EPA with a role in reviewing PSD permit applications to ensure that a proposed facility's emissions will not adversely impact air quality in class I areas. *See id.* § 7475(d)(2)(B). If the EPA files a notice alleging the potential for such an impact, the State may not issue a PSD permit unless the facility demonstrates that its emissions will not cause or contribute to concentrations which exceed allowable increments for class I areas. *Id.* § 7475(d)(2)(C)(i).

emission limitations which are necessary if the national standards it has set are to be met." *Id.* (emphases added).

As the Court explained, "[t]he Act gives the [EPA] *no* authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [Act's] standards." *Id.* (emphasis added). "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations *it deems best suited to its particular situation*." *Id.* (emphasis added). *See also Union Elec. Co.* v. *EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent").

This basic division of responsibilities carried through to the PSD program. In *Alabama Power*, *supra*, the seminal case addressing the Act's PSD provisions, the D.C. Circuit acknowledged that the EPA "has the authority * * * to prevent or to correct a violation of the increments." 636 F.2d at 361. The court emphasized, however, that "the agency is without authority to dictate to the States their policy for management of the consumption of allowable increments." *Id.*

Because Congress decided that "air pollution prevention * * * and air pollution control *at its source* is the primary responsibility of States and local governments," 42 U.S.C. § 7401(a)(3) (emphasis added), it makes perfect sense that Congress would vest the States with the sole discretion to decide what constitutes BACT for a particular source. The EPA may believe that maintaining ultimate veto power over state BACT determinations is necessary to fulfill its oversight role under the CAA, *see* J.A. 148-149, 257, but Congress clearly thought otherwise. As Judge Posner observed in holding that the EPA could not bring an enforcement

action in the absence of statutory authority to do so, "[t]he primary responsibility for the Act's enforcement at the level of the individual plant has been lodged in the states rather than in the national EPA, so it would not be surprising if Congress did not equip the EPA with a complete quiver of enforcement arrows." *United States* v. *AM General Corp.*, 34 F.3d 472, 475 (7th Cir. 1994). *See also Michigan* v. *EPA*, 268 F.3d at 1084 ("we have before had occasion to remind EPA that its mission is not a roving commission to achieve pure air").

Moreover, even in clean air areas, Congress anticipated—and desired—continued economic development and growth. *See* 42 U.S.C. § 7470(3) ("insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources" among the purposes of the PSD provisions). Weighing the competing demands of economic growth and pollution control entails considering the cost of control. The EPA generally does not consider costs or the impact on economic growth in setting national standards, but the States do so in "deciding what emissions reductions will be required for which sources." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 470 (2001). *See id.* at 493 (Breyer, J., concurring) ("States may consider economic costs when they select the particular control devices used to meet the standards.").

By giving the States the authority to determine BACT "on a case-by-case basis," Congress ensured that the States would be able to effectively "manage their allowed internal growth" under the Act. *Alabama Power Co.*, 636 F.2d at 364. The flexible approach adopted by Congress—involving the weighing of "energy, environmental, and economic impacts and other costs"—allows state BACT determinations to reflect policy judgments about how to balance economic growth and pollution control in particular instances, while complying with national standards. "[A]ssuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id.*

This case amply illustrates the wisdom of Congress's choice. The Red Dog Mine is the largest private employer in the Northwest Arctic Borough, where geography and the harsh environment pose unique employment challenges, offer few employment alternatives, and limit any concern about other industrial development that might compete with the mine for consumption of available increments. In making its BACT determination for the MG-17 generator—an essential component of Cominco's PRI project, expected to generate nearly 100 new jobs—the State of Alaska specifically considered "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). *See* J.A. 200-211. Recognizing the mine's "unique and continuing impact" on the economy of the borough, the State decided not to require a control with an "excessive economic cost." J.A. 208.

The EPA, operating out of its regional office in Seattle, Washington, had different priorities, desiring to promote its preferred "control technology of choice," J.A. 129, rather than limit the impact on the precarious economy of Northwest Alaska. The EPA thus overturned the State's BACT determination—even though the State's permit decision not only complied with the NAAQS and PSD increments but was likely to result in *lower* overall NOx emissions than if the EPA's preferred technology had been selected. If Alaska is not allowed the flexibility to make a BACT determination that is expected to result in cleaner air while taking into account local conditions in a community situated far above the Arctic Circle, it is difficult to imagine just what Congress had in mind in its "division of responsibilities" in the CAA. *Train*, 421 U.S. at 79.

B. The Legislative History Of The CAA Confirms That BACT Is "Strictly A State And Local Decision."

The legislative history of the CAA confirms that Congress intended to vest the discretion to determine BACT for particular sources in the States—and the States alone. The Act's PSD provisions were enacted as part of the Clean Air Act Amendments of 1977. For nearly a decade, federal air pollution control legislation had reflected a policy to prevent the significant degradation of clean air. *See* H.R. Rep. No. 95-294, at 103. In amending the CAA in 1977, Congress sought "to provide [a] clearer definition of [that] policy" and "more specific congressional guidance as to how [that] policy is to be implemented." *Id.* *See also* S. Rep. No. 95-127, at 28.

To this end, Congress established maximum allowable increments for certain pollutants in clean air areas, *see* 42 U.S.C. § 7473, and directed the EPA to establish increments or similar measures for others, *see id.* § 7476. Congress also established a preconstruction review and permitting process for all "major emitting facilities." *See id.* § 7475. The House Committee Report explains that "[t]he purpose of the State permit process is to provide that the allowable pollution increments and appropriate emission limitation for each source * * * will not be exceeded." H.R. Rep. No. 95-294, at 145.

The PSD provisions enacted by Congress were intended to strike a balance. Congress plainly sought to "protect clean air areas from deteriorating." S. Rep. No. 95-127, at 29. At the same time, however, Congress wanted to "permit[] the economic development necessary to achieve a steady improvement in our standard of living." *Id.* *See also* H.R. Rep. No. 95-294, at 147 (legislation "[p]rotects clean air resources while permitting both the economic development needed to assure a safe and secure life for all Americans, and the

domestic resource development essential for energy independence"). As the House Committee Report explains, "States and local governments (not Federal agencies) will determine appropriate policy after considering the multiple objectives of minimizing air pollution increases in clean air regions and permitting stable, long-term, commercial, industrial, and energy developments." *Id.* at 146.[7]

To allow the States to determine "how much more pollution will be allowed in clean air areas," *id.* at 147, Congress gave the States broad flexibility to classify most regions within their borders as class I (allowing "very small" increases over existing pollution), class II (allowing "moderately large" increases over existing pollution), or class III (allowing "large" increases over existing pollution). *Id.* at 142. *See* 42 U.S.C. §§ 7472, 7474. As the House Committee Report explains, "[b]y choosing a classification for an area, the State actually will be making a decision on the future pollution increases that will be allowed in that area." H.R. Rep. No. 95-294, at 143.[8]

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[7] The House Committee Report further elaborates:

> The committee purposely chose not to dictate a Federal response to balancing sometimes conflicting goals. It purposely chose not to dictate what State and local decisions on air quality deterioration must be. Maximum flexibility and State discretion are the bases of the committee's approach. The committee carefully balanced State and national interests by providing for a fair and open process in which State and local governments and the people they represent will be free to carry out the reasoned weighing of environmental and economic goals and needs. [H.R. Rep. No. 95-294, at 146.]

[8] In the 1977 amendments, Congress specifically "reject[ed] the approach" taken by the EPA in its then-current regulations, which would give the EPA "veto power over all State classifications which it deems 'arbitrary and capricious.' " H.R. Rep. No. 95-294, at 148-149. The House Committee explained that "unlike the administration's regulations, the bill does not authorize EPA to

The "key" to managing economic growth, however, is BACT. S. Rep. No. 95-127, at 31. For this reason, Congress "place[d] this responsibility *with the State*, to be determined in a case-by-case judgment." *Id.* (emphasis added).[9] The Senate Committee Report explains that the term is intended to have "*broad flexibility* in how it should and can be interpreted, depending on site," and that "[t]he weight assigned to [each of the statutory] factors is to be determined *by the State*." *Id.* (emphases added). The "flexible approach" adopted by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as *anticipated and desired economic growth for the area*." *Id.* (emphasis added). In short, as the Senate Committee Report emphasizes, BACT is "strictly a State and local decision"—"[f]lexibility and State judgment are [its] foundations." *Id.*

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disapprove any State redesignation decision on the ground that it is 'arbitrary and capricious' or that environmental, health, or other factors should have been given more weight in the State's decision." *Id.* at 150. Congress chose "to remove from the States the threat of EPA 'second-guessing' the wisdom of every State decision * * *." *Id.*

The EPA's position in this case ascribes to the same Congress that expressly overturned the EPA's asserted authority to review state classification decisions it deemed "arbitrary and capricious" the unstated intent to subject the far more localized BACT determinations to just such review.

[9] The BACT requirement was added by Senate amendment. *See* S. Rep. No. 95-127, at 151; H.R. Conf. Rep. No 95-564, at 152 (1977). The EPA's regulations at the time required that new or modified sources be subject to BACT, as "specified *by the Administrator*," for certain pollutants. 40 C.F.R. § 52.21(2)(ii) (1976) (emphasis added). Recognizing the significance of this "key decision," Congress chose not to leave it in the hands of the EPA, but instead squarely "place[d] this responsibility *with the State*." S. Rep. No. 95-127, at 31 (emphasis added).

The legislative history of the Act's PSD provisions and of BACT in particular thus makes abundantly clear that Congress intended the States—"not Federal agencies"—to determine BACT, and that Congress intended the States to have "broad flexibility" in doing so. H.R. Rep. No. 95-294, at 146; S. Rep. No. 95-127, at 31. The Ninth Circuit below nevertheless held that the legislative history of the CAA "compel[led]" the conclusion that the EPA has the "ultimate authority" to decide what constitutes BACT for a particular source. Pet. App. 7a, 11a. Yet instead of addressing the most pertinent legislative history—*i.e.*, that *specifically* discussing BACT—the Ninth Circuit simply ignored it.

Moreover, nothing in the legislative history actually invoked by the court below even remotely supports its decision. The court cited both the 1970 amendment of the CAA, which "directed the EPA to publish NAAQS and the states to develop implementation plans to meet them," and the 1977 amendment, establishing the PSD program "to prescribe allowable levels of air quality degradation in clean air areas." Pet. App. 9a-10a. As discussed above, however, far from demonstrating that Congress intended to give the EPA "ultimate authority" over state BACT determinations, these chapters of the Act's history in fact suggest just the opposite. They make clear that Congress envisioned a division of responsibilities—in both the Act in general and the PSD provisions in particular—under which Federal authorities set minimum standards and the States weigh competing priorities "when they select the particular control devices used to meet the standards." *American Trucking*, 531 U.S. at 493 (Breyer, J., concurring).

The Ninth Circuit also cited Congress's enactment of Section 113(a)(5) in 1990—some thirteen years *after* Congress directed that BACT be determined by "the permitting authority, on a case-by-case basis." *See* Pet. App. 10a. The mere enactment of Section 113(a)(5), however, provides no support for the Ninth Circuit's decision. That provision

simply authorizes the EPA to enforce any "requirement" of the Act's PSD provisions. *See* 42 U.S.C. § 7413(a)(5). It does not have anything to say about what those requirements in fact are. There are many requirements in the PSD provisions that the EPA may enforce—that a permit be required, that the permit contain a BACT limitation, that allowed emissions not exceed the NAAQS or available increments. As explained, however, the only BACT "requirement" pertinent here is that a state-issued PSD permit contain a BACT limitation determined by the State "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." *Id.* § 7479(3). Section 113(a)(5) gives the EPA the authority to enforce that requirement. But it by no means gives the EPA the authority to do what it did here—invalidate a state permit decision simply because the EPA would weigh the pertinent factors differently than the decisionmaker Congress chose to make the BACT determination.

C. The EPA's Recourse In This Case Was Not To Unilaterally Overturn The State's BACT Determination, But To Challenge It Through The Available Review Process.

Importantly, none of this is to say that the EPA is without recourse when it believes a State has failed to provide a "reasoned justification" for its BACT determination. Pet. App. 16a. As noted, before a PSD permit may issue, the State must allow all interested parties, including "representatives of the Administrator," to submit comments on, among other things, "control technology requirements." 42 U.S.C. § 7475(a)(2). The EPA had ample opportunity to do so here. As required by the Act, Alaska had "transmit[ed] to the [EPA] a copy of [Cominco's] permit application * * * and provide[d] notice to the [EPA] of every action related to the consideration of [the] permit." *Id.* § 7475(d).

Under Alaska law, any "person" who participated in the public comment process on a proposed permit may pursue an administrative appeal of a permit decision, followed by judicial review. *See* Alaska Stat. §§ 44.62.560, 46.14.200; 18 Alaska Admin. Code § 50.315(f); Alaska R. App. P. 601(b). The term "person" includes "an agency of the United States." Alaska Stat. § 46.14.990 (20). Thus, in this case, the EPA was free to participate in the public comment process on Cominco's draft permit, and then, if it believed that the State had failed to adequately justify its final permit decision, challenge that decision through the State's review process.

Instead, the EPA elected to bypass these available procedures and unilaterally overturn Alaska's BACT determination. The Ninth Circuit below sanctioned that result, but the consequences of its decision suggest that it is clearly not right. To begin with, under the decision below, there is nothing to prevent the EPA from invalidating a BACT determination at any time—months, even years, after a permit has been issued. By that time, both the State and the source will have devoted a substantial amount of time and resources to the permitting process, and the source may also have already invested in costly technology approved by the State. In this case, for instance, ADEC and Cominco spent more than a year attempting to reach an agreement on BACT. *See* J.A. 131. Requiring the EPA to pursue available state administrative and judicial procedures—rather than allowing the EPA free rein to override a state BACT determination at any time—would bring certainty and finality to the permitting process. *See AM General*, 34 F.3d at 474-475 (refusing to allow the EPA to "mount a collateral attack" on a permit where the EPA had the "alternative remedy" of an administrative appeal followed by judicial review). *See also* S. Rep. No. 95-127, at 32 ("Nothing could be more detrimental to the intent of [the PSD] section and the integrity of [the] act than to have the process encumbered by bureaucratic delay.").

Congress specified in unambiguous terms that BACT was to be determined by "the permitting authority"—*i.e.*, the State. The Ninth Circuit's decision that the State had only "initial responsibility" while the EPA had "ultimate authority" to make that determination, Pet. App. 10a-11a, introduces disabling uncertainty and confusion into the allocation of responsibility. *See, e.g., Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (jurisdictional rules should be clear and easy to apply). And the asserted reason for compromising the bright-line rule in the Act—the need to correct "unreasoned" state determinations—is hardly compelling, given the availability of state administrative and judicial review addressed to just that possibility.

The Ninth Circuit's decision—requiring the States to go into federal court to challenge the EPA's invalidation of a BACT determination—also improperly shifts the burden of persuasion from the EPA to the States, undermining the deference to which a State's decision is entitled. Had the EPA challenged Alaska's permit decision through the state review process, the *EPA* would have had to demonstrate that the *State*'s decision was arbitrary or capricious. *See, e.g., Bering Straits Coastal Mgmt. Program* v. *Noah*, 952 P.2d 737, 741 (Alaska 1998). Because the EPA chose instead to unilaterally overturn the State's judgment, suddenly the *State* had to show that the *EPA*'s action was arbitrary or capricious. *See* 5 U.S.C. § 706(2)(A). The procedural sleight-of-hand upheld by the Ninth Circuit also results in an awkward and unwieldy inquiry—whether the EPA acted arbitrarily or capriciously in deciding that the State had acted arbitrarily or capriciously. *See* Pet. App. 13a-16a; Opp. 21 n.11 (noting that "in enforcing a finding of noncompliance or order, EPA may have to convince a district court that the permitting authority arbitrarily or capriciously applied the BACT requirement," and that in cases like this one, the EPA "must

defend its finding of non-compliance under an arbitrary-or-capricious standard of review").

By allowing the EPA to short-circuit the state review process in this case, the Ninth Circuit also deprived Alaska of the opportunity to adequately defend its permit decision. Had the EPA pursued a state administrative appeal of Alaska's BACT determination, the State and Cominco could have presented evidence at an adjudicatory hearing in support of the State's decision. *See* 18 Alaska Admin. Code §§ 15.240, 15.270. That evidence would have been part of the administrative record on judicial review. *See, e.g., Miners Advocacy Council, Inc.* v. *State of Alaska, Dep't of Envtl. Conservation*, 778 P.2d 1126, 1138-40 (Alaska 1989), *cert. denied*, 493 U.S. 1077 (1990); *Noey* v. *Department of Envtl. Conservation*, 737 P.2d 796, 799, 801-806 (Alaska 1987). Instead, the State's BACT determination was reviewed by the Ninth Circuit on an incomplete record. Even that court had the sense that something was amiss, intimating at one point its view that an enforcement action in district court, as opposed to review in the court of appeals, would "provide a preferable means of resolving the issues in this case, for the parties in that context [would] be able *to develop a full record on pertinent issues*." Pet. App. 22a (emphasis added).

The federal administrative record consists of materials "upon which the *EPA* relied in *its* determination that Selective Catalytic Reduction, and not Low NOx, is BACT for the MG-17 generator." *Id.* (emphases added). That record may not include all the materials upon which the *State* relied in making *its* BACT determination, even though that information is critical to a fair assessment of the State's decision. *See, e.g., General Motors Corp.* v. *EPA*, 168 F.3d 1377, 1382 (D.C. Cir. 1999) ("when a permit has been issued by a state agency, it alone will have the information pertinent to an attack upon the decisionmaking process that led to the issuance of that permit").

The EPA's own view is "that existing law and regulations require an opportunity for state judicial review under approved PSD SIPs by permit applicants and affected members of the public." 61 Fed. Reg. 1800, 1882 (1996). According to the agency, the "opportunity for public review and comment, as provided in the statute and regulations, is seriously compromised where an affected member of the public is unable to obtain judicial review of an alleged failure of the state to abide by its PSD SIP permitting rules." *Id.*

The EPA thus regards the state review process as the means by which "interested persons" who have commented on a proposed permit may vindicate their interests. 42 U.S.C. § 7475(a)(2). Under the CAA, such "interested persons" include "representatives of the Administrator." *Id.* Thus, even the EPA's *own* view of the law suggests that the EPA's proper recourse in this case was to challenge Alaska's permit decision through the state review process, not quash it by regulatory fiat.[10]

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[10] The EPA also has other remedies at its disposal to ensure compliance with the Act's requirements. For instance, if the EPA finds that violations of a SIP or permit program are so widespread that they appear to be the result of lax enforcement by the State, the EPA may assume enforcement of the plan or program. *See* 42 U.S.C. § 7413(a)(2). Similarly, if the EPA finds that a State's SIP is "substantially inadequate" to attain or maintain the NAAQS or to comply with any other requirement of the Act, the EPA may call for a SIP revision. *Id.* § 7410(k)(5). The EPA has never taken either of these actions against Alaska. The EPA's objection is limited to the particular BACT determination for this particular permit. Under the Act, such determinations about how to comply with national standards at the source level are for the State, not the EPA, to make.

II. EVEN IF THE EPA MAY INVALIDATE A STATE BACT DETERMINATION IN SOME CASES, IT HAD NO AUTHORITY TO DO SO HERE.

Even if this Court were to conclude that the EPA has some authority to review a State's BACT determination, the EPA still had no authority to invalidate Alaska's permit decision in this case. The CAA directs only that the States take into account "energy, environmental, and economic impacts and other costs" in determining BACT "on a case-by-case basis." 42 U.S.C. § 7479(3). The record in this case demonstrates that ADEC carefully considered each of the applicable factors and provided a reasoned explanation for its decision that Low NOx was BACT for the MG-17 generator. The EPA has stated that "if a state has met all procedural norms, considered all available control technologies, and given a reasoned justification of the basis for its decision, *EPA has no grounds on which to challenge a final substantive state decision*." Pet. App. 12a (quoting 1993 EPA legal opinion) (emphasis added and omitted). *See* Cert. Rec. 72-003. Thus, under the EPA's own view of its authority under the CAA, the EPA had no basis to intervene and overturn Alaska's permit decision in this case.

Alaska's BACT determination came after an eighteen-month process during which ADEC (1) carefully reviewed Cominco's application; (2) worked closely with Cominco to resolve permitting issues; (3) conducted independent research and prepared extensive technical analyses; (4) solicited and considered comments from interested members of the public, including belated input from the EPA; and (5) worked closely with the EPA in an attempt to resolve their disagreement on BACT for the MG-17 generator. *See* J.A. 159-224.

In its final TAR, ADEC spent nearly ten pages explaining the basis of its conclusion that Low NOx was BACT for the MG-17 generator. J.A. 197-211. As even the EPA has acknowledged, ADEC "provid[ed] a detailed accounting of

the process." J.A. 286. Although not required to do so, ADEC followed the EPA's "top-down" approach, under which ADEC identified all available NOx control technologies, ranking the technically feasible ones in descending order of NOx removal. ADEC then specifically considered "energy, environmental, and economic impacts and other costs" associated with SCR. 42 U.S.C. § 7479(3). *See* J.A. 200-208. Although ADEC discounted Cominco's claim that energy or environmental impacts warranted eliminating SCR, J.A. 200-203, ADEC determined that SCR would have adverse economic impacts.

ADEC first concluded that the cost-effectiveness of SCR was "outside the range of costs being borne by similar sources under recent BACT determinations." J.A. 204. Rejecting Cominco's higher cost estimates, ADEC estimated the capital costs of SCR to be $2.9 million and annual operating costs to be $635,000, translating into a cost-effectiveness of $2,100 per ton of NOx removed. *Id.* ADEC then examined an EPA clearinghouse database to determine the range of costs for similar diesel-fired electric generators in recent BACT determinations. Although there were "no recent BACT determinations for diesel engines used as primary power generation" listed, there were two 1996 BACT determinations for such sources that imposed controls with a cost-effectiveness of $432 per ton of NOx removed. J.A. 205. ADEC also reviewed its own recent BACT determinations for similar diesel-fired electric generators, and found that the cost-effectiveness of the controls imposed ranged between $0 to $936 per ton of NOx removed. J.A. 205-206. Thus, the costs of SCR "on a cost-per-ton removal basis"—$2,100 per ton of NOx removed—were "significantly higher" than the costs of the controls imposed in ADEC's recent BACT decisions for such sources, J.A. 206-207, and nearly twice as high as the $1,106 cost per ton of Low NOx. *See* Cert. Rec. 45-029.

Next, because the Red Dog Mine generates all its own power—and thus acts as its own electric utility—ADEC considered whether the costs of SCR would be prohibitive for a rural Alaska utility. ADEC estimated that the cost of SCR was 3 cents per kilowatt-hour, and that the average cost of electricity in rural Alaska was approximately 15 cents per kilowatt-hour. Because the imposition of SCR "would be equivalent to a 20% increase in the electric rate of the facility," ADEC concluded that the costs of SCR would be "disproportionate" for a utility and thus, by analogy, for a mine required by site-specific conditions to supply its own power. J.A. 206.[11]

Whatever the significance might be in other cases of SCR's relatively poor cost-effectiveness and its disproportionate cost as control technology on a primary energy source, ADEC concluded that such considerations warranted eliminating SCR as BACT in the unique situation of the Red Dog Mine. J.A. 207-208. Cominco had represented that the costs of SCR were "very significant, affecting Cominco's cost of production and competitiveness in world markets." J.A. 204. As ADEC noted, the Northwest Arctic Borough has "limited permanent year-round job opportunities" and an "historical[ly] high unemployment rate." J.A. 207. Indeed, in the preceding two years, "the Borough's unemployment rate ha[d] been the highest in the State." *Id.* The Red Dog Mine, however, has had "a dramatic [effect] [in] revers[ing] these historic trends for this region of the State." *Id.* Before the mine opened, "borough wages were well below state average wages." *Id.* Now, the mine "provides high paying year round employment." *Id.* Its payroll represents "over a quarter of the borough's" wage base, and its relationships

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[11] Even though Cominco had not provided "detailed financial information" concerning the impact of SCR on its operations, ADEC could thus still conclude on a site-specific basis that the cost of SCR was "excessive." J.A. 207.

with contractors and vendors have further "boosted the borough's private sector economy." *Id.*

In recognition of the "unique and continuing impact" of the mine on the community of the Northwest Arctic Borough, J.A. 208, ADEC chose to select Low NOx rather than SCR as BACT. Yet because Cominco had agreed to install Low NOx on *all* its generators, ADEC's decision was nevertheless expected to result in *lower* NOx emissions than if ADEC had selected SCR as BACT for the MG-17 generator.[12]

This Court has made clear that an agency's explanation for a particular decision is "satisfactory" so long as the agency articulates a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation

[12] Early in the permitting process, Cominco proposed to install Low NOx on all its generators, not just the MG-5 and MG-17 generators subject to BACT review at the time. *See supra* at 10-11. ADEC initially decided to accept Cominco's proposal, because it was likely to result in lower overall NOx emissions than if SCR were installed on only the MG-5 and MG-17 generators. J.A. 85-88. ADEC had conferred with the EPA and understood the agency to agree with this emissions-netting approach. *See* J.A. 244; Affidavit of Michele Brown ¶ 9 (Mar. 13, 2000). The EPA, however, later objected to ADEC's emissions-netting approach, even though the CAA directs the States to weigh "environmental" impacts in determining BACT "on a case-by-case basis." 42 U.S.C. § 7479(3). *See* J.A. 96-97.

In its final TAR, to accommodate the EPA's objection, ADEC did not rely on emissions savings in determining that Low NOx was BACT, but instead went through the foregoing analysis. J.A. 199, 200-208. Nevertheless, because Cominco had agreed to install Low NOx on all its generators if Low NOx were selected as BACT on MG-17, the State's permit decision was still likely to result in lower NOx emissions—at a fraction of the cost of SCR. J.A. 85-88.

omitted). ADEC's explanation of its reasons for rejecting SCR—that the costs of SCR were "excessive" both in terms of cost effectiveness and in terms of impact on a primary energy source, and that the unique situation of the Red Dog Mine warranted eliminating SCR on that basis—easily passes muster under that standard. Under the EPA's own view of the law, the EPA had no authority to disregard ADEC's "reasoned justification" and overturn the State's judgment.

In insisting that SCR—not Low NOx—was BACT, the EPA took issue with ADEC's economic impact analysis, asserting that, "in order to justify economic infeasibility," ADEC's analysis "should have gone beyond a review of cost-effectiveness to include an analysis of whether requiring Cominco to install and operate [SCR] would have any adverse economic impacts upon Cominco *specifically*." J.A. 127 (emphasis added). In its zeal to impose its "technology of choice," however, the EPA overlooked that ADEC had done just that in analogizing the mine to a rural Alaska utility, concluding that SCR would have a "disproportionate" impact on such a utility, and thus on the mine as well. *See* J.A. 116, 206.[13]

In any event, the CAA requires only that the States consider "energy, environmental, and economic impacts and other costs" in determining BACT for particular sources. 42 U.S.C. § 7479(3). It does not direct them to weigh or apply

[13] The EPA also noted that ADEC had found SCR "economically feasible" in its preliminary TAR. *See* J.A. 96. ADEC's decision at that time to accept Cominco's emissions-netting proposal, however, had mooted any need to consider the impact of SCR costs, and in fact ADEC in the preliminary TAR did not analyze recent BACT decisions for similar sources or the site-specific cost considerations of imposing SCR. *See* J.A. 235 (Cominco criticism of ADEC failure to analyze economic feasibility in preliminary TAR). The decision in the final TAR not to rely on emissions savings necessitated such analysis and led to a more informed weighing of economic impacts.

those factors in any particular manner. To the contrary, Congress intended the States to have "broad flexibility" in applying the statutory factors, and "[t]he weight assigned to such factors is to be determined *by the State*." S. Rep. No. 95-127, at 31 (emphasis added). ADEC's decision to gauge the economic impact of SCR in part by comparing its cost-effectiveness to "the range of costs being borne by similar sources under recent BACT determinations" was well within its discretion, J.A. 204, as was ADEC's decision to analogize the mine's primary power source to a rural Alaska utility. The EPA accordingly had no authority to force the State to consider "economic impacts" in a manner dictated by the EPA. *See American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1, 8-9 (D.C. Cir. 2002) (invalidating EPA rule requiring States to consider one of several enumerated statutory factors for determining best available retrofit technology ("BART") in a particular manner).

Moreover, the EPA's approach in criticizing ADEC's decision was itself contrary to the EPA's *own* published guidelines. According to the agency's New Source Review Workshop Manual—upon which "EPA and state permitting agencies widely rely," EPA 9th Cir. Br. 13 n.4—"[i]n the economic impact analysis, primary consideration should be given to quantifying the cost of control *and not the economic situation of the individual source.*" EPA, *New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting* (1990), at B.31 (Cert. Rec. 71-115) (emphasis added). *See also id.* ("the economic impact of [control] alternatives on the particular source under review should not be nearly as pertinent to the BACT decision making process as the average and, where appropriate, incremental cost effectiveness of the control alternative"). Sources "should demonstrate to the satisfaction of the permitting agency that costs of pollutant removal for the control alternative are disproportionately high when compared to the cost of control *for that particular pollutant*

and source in recent BACT determinations." *Id.* at B.32 (Cert. Rec. 71-116) (emphasis added). The EPA's Environmental Appeals Board (which hears challenges to PSD permits issued under the federal program) follows this approach: "We accept that cost-effectiveness is determined in most cases by showing that a control option * * * is either within or outside the range of costs being borne by similar sources under recent BACT determinations." *In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 149 (EPA Envtl. App. Bd. 1994).

Applying the EPA's own criteria, ADEC determined that the cost of SCR on a per-ton-removal basis was nearly *double* that of the most expensive technology imposed as BACT to reduce NOx emissions from a similar type of diesel-fired electric generator in recent BACT determinations. J.A. 205-206. Indeed, although the EPA has maintained that the cost of SCR is "well within the range of costs EPA has seen permitting authorities nationwide accept as economically feasible for NOx control," J.A. 150, the EPA has *never* been able to cite an example where SCR has been imposed as BACT to reduce NOx emissions from a similar source. *See* J.A. 142 ("EPA has not required SCR as BACT on a diesel-fired reciprocating engine in any case, nor has any state"). The EPA's inexplicable refusal to follow its own guidelines in this case practically defines arbitrary and capricious behavior. *See National Ass'n of Cas. & Surety Agents* v. *Board of Gov'rs of the Fed. Reserve Sys.*, 856 F.2d 282, 287 (D.C. Cir. 1988) ("It is, of course, a fundamental precept of administrative law that agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure.") (quotation and alteration omitted), *cert. denied*, 490 U.S. 1090 (1989).

The EPA may have analyzed the cost-effectiveness data differently than ADEC, and may not have found the utility analogy as compelling as ADEC did. In addition, the EPA

may not have been as concerned as ADEC to avoid imposing the higher costs of SCR on the only significant private sector source of year-round employment for hundreds of miles around. But the EPA cannot claim that ADEC's decision was "unreasoned." Nor can the EPA assert that ADEC's determination in any way results in emissions exceeding national standards or permitted increments. How to control emissions within those standards, without exceeding available increments, was for the State to decide.

The Ninth Circuit nevertheless held that the EPA had not acted arbitrarily or capriciously because, it concluded, ADEC *had*. Pet. App. 13a-16a. First, the court stated that the final TAR "reveals that there were no recent permit decisions involving BACT determinations for diesel engines used as primary power generators." Pet. App. 14a. That is erroneous; the final TAR specifically notes "four recent BACT determinations for diesel-electric generators used for primary power production" that imposed BACT controls with a cost-effectiveness ranging between $0 to $936 per ton of NOx removed. J.A. 205-206.

Compounding its error, the court next stated that "the cost-effectiveness of recent NOx control BACT decisions ranged from $0 to $7,000 per ton of NOx removed," and that the cost-effectiveness of SCR in this case was "well within the applicable range." Pet. App. 14a. The figure the court relied on, however, pertained to ADEC's recent BACT determinations for NOx control generally, not for NOx control for *similar* sources—*i.e.*, diesel-fired electric generators used for primary power generation. *See* J.A. 205-206. As just explained, the cost of controls for *similar* sources ranged between $0 to $936 per ton of NOx removed, less than half the estimated cost of SCR in this case—$2,100 per ton of NOx removed. As noted, the EPA itself considers cost-effectiveness in light of "the range of costs being borne by *similar* sources under recent BACT determinations." *In re*

Inter-Power of New York, Inc., 5 E.A.D. at 149 (emphasis added).

The court also cast aside ADEC's utility cost analysis, noting that "Cominco does not, in fact, buy power from an electric utility." Pet. App. 14a. Of course, that is just the point. The Red Dog Mine must supply its own electricity, and thus acts as its own utility. Because, as ADEC concluded, the costs of SCR would be "disproportionate" if imposed on a rural Alaska utility, by analogy those costs would be "disproportionate" if imposed on the mine. J.A. 206.

Lastly, the court turned to ADEC's consideration of the mine's importance to the local economy. The court was "uncomfortabl[e]" with this consideration, holding that it was not "an accepted justification" for rejecting SCR as BACT. Pet. App. 16a. But the CAA specifically directs that States consider "economic impacts" in determining BACT for a particular source. 42 U.S.C. § 7479(3). That includes the impact of a particular technology on "*anticipated and desired economic growth for the area.*" S. Rep. No. 95-127, at 31 (emphasis added). In recognizing the mine's importance to a region where few industries compete for the available increments, ADEC made precisely the sort of "growth-management decision[]" that was "left by Congress for resolution by the states." *Alabama Power*, 636 F.2d at 364.

* * *

The EPA's objection at the time it issued the orders in question was *not* that Alaska had failed to adequately explain its reasons for selecting Low NOx as BACT. Instead, the EPA simply preferred a different choice—SCR. That is clear from the EPA's December 10, 1999 Finding of Noncompliance and Order, which nowhere states that ADEC failed to provide a "reasoned justification" for selecting Low NOx, but instead simply asserts, in the "Findings of *Fact*" no less, that "SCR is BACT for the Wartsila diesel generators." Pet.

App. 30a (emphasis added), 34a. Far from appreciating that the determination of BACT is a policy-laden discretionary judgment to be made by someone else on a case-by-case basis after prioritizing and weighing a non-exclusive list of impacts and costs, 42 U.S.C. § 7479(3), the EPA view is that, as a *factual* matter, SCR is the "control technology of choice" and that "[o]nce a control technology has been determined to be BACT on a particular *type* of source, *i.e.*, an internal combustion engine, generally, that control technology should be considered economically feasible." J.A. 127, 129 (emphasis added). Indeed, despite Congress's unambiguous intent that the BACT determination be "strictly a State and local decision" made on a "case-by-case" basis "depending on site," S. Rep. No. 95-127, at 31, and Congress's decision "not to dictate a Federal response to balancing sometimes conflicting goals," H.R. Rep. No. 95-294, at 146, the EPA twice purported to justify its order substituting SCR as BACT on the ground that the EPA had a "responsibility to ensure national consistency." J.A. 148, 303. When it came to BACT, however, Congress had a different idea, and left that determination—"on a case-by-case basis"—to the States.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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STATUTORY AND REGULATORY ADDENDUM

The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* provides, in pertinent part:

§ 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

* * *

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments;

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

* * *

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

* * *

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

* * *

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * *

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not

meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

* * *

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of

such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

* * *

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within

such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to

any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant

to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

* * *

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

* * *

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the

Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval,

disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

* * *

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

* * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * *

§ 7413. Federal enforcement

(a) In general

* * *

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such

failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by—

(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

* * *

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;[1]

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

---

[1] So in original. The semicolon probably should be a comma.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

* * *

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(l) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

* * *

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator

has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

* * *

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

* * *

§ 7477. Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

* * *

§ 7479. Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal

production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

* * *

(2)(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

Selected Provision of Title 40 of the Code of Federal Regulations, Part 52:

PART 52—PROTECTION OF THE ENVIRONMENT

Subpart C—Alaska

§ 52.96. Significant deterioration of air quality.

(a) The State of Alaska Department of Environmental Conservation Air Quality Control Regulations as in effect on June 2, 1988 (specifically 18 AAC 50.020, 50.021, 50.300, 50.400, 50.510, 50.520, 50.530, 50.600, 50.620, and 50.900) and the State air quality control plan as in effect on June 2, 1988 (specifically, Section I.B. AIR QUALITY CONTROL REGIONS, Section I.C. ATTAINMENT/NONATTAINMENT DESIGNATIONS, Section I.D. PREVENTION OF SIGNIFICANT DETERIORATION DESIGNATIONS, Section IV.F. FACILITY REVIEW PROCEDURES, Section IV.G APPLICATION REVIEW AND PERMIT DEVELOPMENT, Section IV.H PERMIT ISSUANCE REQUIREMENTS, Appendix IV.1. PSD area Classification and Reclassification, and Appendix V ADEC Ambient Analysis Procedures), are approved as meeting the requirements of part C for preventing significant deterioration of air quality.

* * *

Selected Provisions of Chapter 50
of the Alaska Administrative Code
(1997)

CHAPTER 50—AIR QUALITY CONTROL

18 AAC 50.310. Construction permits: application.

* * *

(d) Prevention of Significant Deterioration Information. For a new facility classified under 18 AAC 50.300(c) or a modification classified under 18 AAC 50.300(h)(3) or (4), a construction permit application must include the following additional information for each air contaminant with an expected actual emissions increase greater than or equal to a quantity listed in 18 AAC 50.300(h)(3):

* * *

(3) a demonstration that the proposed limitation represents the best available control technology for each air contaminant and for each new or modified source;

* * *

18 AAC 50.990. Definitions.

* * *

(13) "best available control technology" means the emission limitation that represents the maximum reduction achievable for each regulated air contaminant, taking into account energy, environmental and economic impacts, and other costs; the resulting emissions must comply with applicable state and federal emission standards; best available control technology includes, for example, design features, equipment specifications, and work practices;

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IN THE
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR TECK COMINCO ALASKA INCORPORATED IN SUPPORT OF PETITIONER

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RULE 29.6 STATEMENT

Teck Cominco Alaska Incorporated ("Teck Cominco") was a petitioner in the Ninth Circuit below and is a respondent supporting petitioner in this Court. Teck Cominco is a wholly-owned subsidiary of Teck Cominco American Incorporated, which is wholly owned by Cominco Mining Worldwide Holdings, Ltd., which is wholly owned by Cominco Mining Partnership, a partnership of Teck Cominco Metals, Ltd. and Teck Cominco Nova Scotia, Ltd. Teck Cominco Nova Scotia, Ltd. is wholly owned by Teck Cominco Metals, Ltd., which is wholly owned by Teck Cominco Limited, a publicly held company.

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---

BRIEF FOR TECK COMINCO ALASKA INCORPORATED IN SUPPORT OF PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 298 F.3d 814 and reproduced at Pet. App. 1a. The Ninth Circuit's prior opinion concluding that it had jurisdiction over this case is reported at 244 F.3d 748 and reproduced at Pet. App. 17a. The Ninth Circuit's order requesting supplemental briefing is reproduced at Pet. App. 24a. The orders of the United States Environmental Protection Agency ("EPA") are reproduced at Pet. App. 26a, 38a, and 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 30, 2002. Pet. App. 1a. The State of Alaska, Department of Environmental Conservation, filed a petition for certiorari on October 25, 2002. The petition was granted on February 24, 2003. 123 S. Ct. 1253. The jurisdiction of the Ninth Circuit was based on 42 U.S.C. § 7607(b)(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are set forth in an addendum to the brief of petitioner State of Alaska.

STATEMENT

Under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, no "major emitting facility" may be constructed or modified in any "clean air" area unless the facility is subject to the "best available control technology," or "BACT." 42 U.S.C. § 7475(a)(4). BACT is defined as "an emission limitation * * * which *the permitting authority*, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *." *Id.* § 7479(3) (emphasis added). In Alaska—as in most States—the "permitting authority" under the Act is the State.

Teck Cominco operates the Red Dog Mine, the world's largest source of zinc concentrate, in Northwest Alaska on lands owned by the NANA Regional Corporation, a regional Native corporation established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* When Teck Cominco decided to modify its facilities to increase production at the Red Dog Mine, Teck Cominco sought permission from the State of Alaska, which subsequently issued a permit designating a certain technology—"Low NOx"—as BACT for a new generator that Teck Cominco planned to build, the MG-17 generator. The EPA disagreed

with the State's BACT determination for the MG-17 generator, however, and issued a series of enforcement orders blocking its construction unless Teck Cominco used a different technology—SCR—that the EPA considered BACT.

Alaska and Teck Cominco sought review of the EPA's orders in the Ninth Circuit. That court agreed with the EPA's contention that the EPA's authority to issue orders enforcing any "requirement" of the Act, *see* 42 U.S.C. §§ 7413(a)(5), 7477, gave it the authority to issue the orders in this case. According to the court below, the State is empowered as the permitting authority to make "the initial BACT decision." Pet. App. 9a. The court held, however, that the Act "provides for EPA enforcement when the state issues a permit based on an improper determination," and "the EPA has the ultimate authority to decide whether the state has complied with the BACT requirements." *Id.* 10a-11a. The court rejected the contention of Alaska and Teck Cominco that what constitutes BACT is determined under the Act by the permitting authority, and that the requirement that a permit contain such a limitation did not give the EPA the authority to substitute its judgment on what constitutes BACT for that of the permitting authority—the State. *Id.* 11a.

Teck Cominco sought but was denied a stay of the Ninth Circuit's judgment. As a direct result of the Ninth Circuit's decision, Teck Cominco—which had spent over a year engaged in discussions with ADEC concerning the permit—was compelled to undertake new discussions with the EPA in an attempt to resolve the BACT issue, at least on an interim basis, and allow for construction and operation of the MG-17 generator. When the State of Alaska sought review of the Ninth Circuit decision in this Court, Teck Cominco filed a response in support of the petition, stressing the importance of resolving which entity—the State or the EPA—was vested with discretion to determine BACT under the CAA. If the judgment below is reversed and the State's

authority to make the BACT determination is confirmed, Teck Cominco will adjust its activities under the permit as appropriate.

SUMMARY OF ARGUMENT

Congress vested the States with the discretion to determine BACT on a case-by-case basis, after weighing energy, environmental, economic, and other costs. The BACT determination can be a complex one, and regulated companies work diligently with state agencies in the course of the permitting process, providing background information, responding to technical inquiries, assessing alternative proposals, and addressing particular concerns. Allowing the EPA to overturn a State's BACT determination and substitute its own view of what constitutes BACT in a particular case—at the end of the permitting process or perhaps even years later—is not only contrary to the Act's text and history, but would introduce disabling uncertainty into the permitting process, given the critical role the BACT assessment can play in determining whether particular development projects may or may not proceed.

Such a role for the EPA is also contrary to Congress's determination that the States are best situated to decide how to manage permitted growth within nationally established limits. Here there is no dispute that Alaska's determination that Low NOx was BACT resulted in emissions consistent with national ambient air quality standards and consistent with the available increments in this clean air area. How to allocate growth within those limits was for the State to decide, and the State could decide that avoiding impairment of the competitiveness of one of the few providers of year-round employment in a challenging region of the State was an important consideration in determining BACT "on a case-by-case basis," particularly since the State's approach resulted in cleaner air than the approach favored by the EPA. It is perhaps not surprising that the EPA weighed the factors

differently, and gave greater weight to promoting what it called "the control technology of choice," J.A. 129, rather than local employment challenges. What is clear is that Congress intended such a decision to be made by the States, not the federal agency.

ARGUMENT

1. The Ninth Circuit's decision below introduces uncertainty and confusion into one of the most important determinations confronting entities subject to regulation under the CAA. Congress provided that BACT be determined on a case-by-case basis by the permitting authority, taking into account energy, environmental, and economic impacts and other costs. 42 U.S.C. § 7479(3). As the statutory language itself makes clear, the BACT determination is highly subjective and discretionary, depending on site-specific considerations and policy-based judgments about various potentially competing factors. As the Senate Committee explained with respect to BACT, "the phrase has broad flexibility in how it should and can be interpreted, depending on [the] site." S. Rep. No. 95-127, at 31 (1977).

Given this flexibility, and the broad discretion vested in the permitting authority, regulated entities work closely with the permitting authority when undertaking a significant project subject to BACT review. That planning and consultation process takes on added significance when atypical site-specific considerations are likely to figure prominently in the BACT determination, as is often the case, for example, when considering a project in the uniquely challenging setting of arctic Alaska. In this case, Teck Cominco spent over a year working with ADEC in the permitting process, responding to various issues and inquiries, and altering its planning to respond to state concerns.

At the end of that process, and without filing comments on the proposed Teck Cominco permit, the EPA issued its order overturning ADEC's BACT determination. The asserted

basis for the EPA's order was that the ADEC permit violated a "requirement" of the CAA. The only pertinent "requirement," however, is that the PSD permit subject the source to a BACT limitation determined by "the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). There is no dispute that the permit in this case contains such a limitation; that it was determined by ADEC, the permitting authority; that ADEC made this determination on a case-by-case basis; and that ADEC did so after expressly considering energy, environmental, and economic impacts and other costs. *See* J.A. 157-158, 200-211. The EPA's objection, in other words, is with the underlying merits of ADEC's determination. The EPA's own orders and documents make that abundantly clear. But nothing in the CAA *requires* a particular BACT determination, and therefore nothing in the CAA authorizes the EPA to block a State's determination simply because the EPA disagrees with it.

Authorizing the EPA to do so creates grave uncertainty for a regulated entity, as Teck Cominco's case makes clear. If the EPA—not, as the CAA provides, "the permitting authority"—is to have "the ultimate authority" with respect to a BACT determination, Pet. App. 10a-11a, then extensive planning and coordinating with the permitting authority may all be for naught. It is no answer to suggest that the EPA be included in such ongoing discussions because the resource and personnel limitations of the EPA prevent it from devoting sufficient attention to a particular source to achieve the same level of understanding of relevant site-specific factors as the permitting authority. This case proves the point; the EPA did not weigh the site-specific considerations and the pertinent energy, environmental, economic and other impacts in reaching its conclusion on BACT.

It is one thing to say that a permitting authority's BACT determination may be subject to standard arbitrary and

capricious review during the normal review process; regulated entities can live with that limited uncertainty, particularly since they can participate in compiling a thorough record supporting the permitting authority's determination. It is quite another to conclude, as did the Ninth Circuit below, that a different regulator can simply second-guess the permitting authority's decision, with the question being whether the *second* regulator's determination is arbitrary and capricious, based not on the full record of the *permitting* authority's decision, but solely on the record of the *second* regulator's determination.

It is important to recognize that the uncertainty introduced by the decision below is in no sense limited to the permitting and planning process. The EPA's position—accepted by the Ninth Circuit—would allow the EPA to "enforce" its view of what BACT should be long after a permit has been issued and a company has invested heavily in costly technology required to comply with the permitting authority's different view. This concern has been raised repeatedly throughout the briefing in this case, *see, e.g.*, Pet. Ct. App. Br. 48, and the EPA has never suggested that it lacks such authority. Its reading of the CAA simply does not admit of such a limitation.

And the adverse consequences of the uncertainty and confusion introduced by the Ninth Circuit's decision are not visited only on companies striving to comply with the CAA, but on the permitting authority as well. Companies have little incentive to coordinate and cooperate with state authorities if determinations made by those authorities are not given binding effect. *See Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60-61 (1987) (allowing citizen suits for past Clean Water Act violations would "curtail[] considerably" discretion of regulator to enforce Act through agreement with regulated entities).

2. Granting the EPA "the ultimate authority" with respect to BACT determinations, Pet. App. 10a-11a, is inconsistent with Congress's recognition that what constitutes BACT in any particular case turns not only on site-specific considerations more suited to assessment by state authorities, but also on a policy-based judgment about how best to manage local growth within national limits. Those judgments cannot be made on the national level. These considerations are highlighted in the present case. ADEC officials—sensitive to the challenges of operating north of the Arctic Circle—were in the best position to weigh the "economic impacts" not only on Teck Cominco, but also on the isolated workforce with few other viable opportunities for year-round employment, particularly in the private sector. The EPA officials may well have wished to balance the costs differently, and favor promotion of a technology never before imposed as BACT on this type of source over a more cost-effective approach that achieves the same environmental result. *See* J.A. 126 (EPA letter) ("a poor cost effectiveness in and of itself should not be construed as a measure of adverse economic impacts"). But Congress appreciated that such judgments were for the States, familiar with local conditions and needs, and not for the EPA. The EPA in this case sought to justify its action as promoting "national consistency," J.A. 148, 303, but Congress in the CAA quite expressly rejected "national consistency" with respect to BACT determinations in favor of state discretion, case-by-case determinations, and site-specific concerns.

ADEC's assessment of the economic impacts on Teck Cominco from requiring SCR as BACT by analogizing to the situation of a rural Alaska utility is a good example. One of the challenges of operating 100 miles north of the Arctic Circle is the inability to plug in to an existing power supply. The Red Dog Mine has to supply its own. In considering the economic impact of requiring SCR as BACT on the mine's power supply, ADEC considered what the impact would be

on a rural Alaska utility in the business of supplying power. After concluding that the impact in such a case would be severe, it made perfect sense for ADEC to regard the impact on Teck Cominco in similar terms. The Ninth Circuit's rejoinder—"Cominco does not, in fact, buy power from an electric utility," Pet. App. 14a—highlights Congress's good sense in leaving such assessments to be made at the state rather than federal level.

If there were something wrong about the manner in which ADEC considered economic costs or any of the other factors it is directed to weigh in determining BACT, any such alleged errors could have been raised in the review process provided in the Alaska SIP. The EPA itself insists that SIPs include such review provisions. But any such alleged shortcomings do not mean that the state-issued PSD permit somehow does not contain a limitation based on BACT, determined by the State after considering the statutory factors. That is the only "BACT requirement" in the CAA, and Teck Cominco's permit plainly complied with that requirement. The EPA's authority to enforce any "requirement" in the Act, therefore, does not authorize it to second-guess the State's BACT determination.

CONCLUSION

For the foregoing reasons, and those in the State of Alaska's brief, the Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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No. 02-658

In the Supreme Court of the United States

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over this pre-enforcement challenge to the Environmental Protection Agency's administrative orders.

2, Whether, if the Environmental Protection Agency (EPA) finds that a state permitting authority has not made a reasonable determination of the best available control technology as required by Section 165 of the Clean Air Act, 42 U.S.C. 7475(a)(4), the EPA has authority under Sections 113(a)(5) and 167 of the Act, 42 U.S.C. 7413(a)(5) and 7477, to issue a finding of noncompliance and administrative orders to prevent construction of a major emitting source.

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In the Supreme Court of the United States

No. 02-658

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 298 F.3d 814. A prior order of the court of appeals addressing its subject matter jurisdiction (Pet. App. 17a-23a) is reported at 244 F.3d 748.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. The petition for a writ of certiorari was filed on October 25, 2002, and was granted on February 24, 2003. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth at App., *infra*, 1a-18a.

STATEMENT

1. Under the Clean Air Act, "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). The Environmental Protection Agency (EPA), for example, establishes national ambient air quality standards (NAAQS) for certain air pollutants, and States play a "statutory role as primary *implementers* of the NAAQS." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 470 (2001); see 42 U.S.C. 7408, 7409. Each State must draft and submit to EPA for approval a state implementation plan (SIP) that, *inter alia*, provides for the attainment and maintenance of the NAAQS. See 42 U.S.C. 7407(a), 7410; see *Train* v. *NRDC*, 421 U.S. 60, 93-94 n.28 (1975).

This case involves particular provisions of the Act applicable to construction of major facilities in areas that are designated as "attainment" or "unclassifiable," *i.e.*, areas of the country—such as much of Alaska—where the NAAQS for a given pollutant are satisfied or for which insufficient data exist to know whether they have been satisfied. See Pet. App. 3a. The key goal of the Act in such areas is to preserve existing air quality, and a State's SIP therefore must "contain emission limitations and such other measures as may be necessary * * * to prevent significant deterioration of air quality" in those areas. 42 U.S.C. 7471; see 42 U.S.C. 7410(a)(2)(D)(i)(II). Under the Act's prevention-of-significant-deterioration—or PSD—program, no "major emitting facility"—*i.e.*, no facility that would emit substantial quantities of pollutants, see 42 U.S.C. 7479(1)—may be constructed in a clean air area unless it satisfies certain statutory requirements. 42 U.S.C. 7475.

Before such a facility may be constructed, its operator must secure a PSD permit "setting forth emission limitations for such facility which conform to the requirements" of the Act. 42 U.S.C. 7475(a)(1). One substantive requirement that

must be reflected in the PSD permit is that the new facility must not "cause, or contribute to * * * air pollution" in excess of certain "maximum allowable increase[s]"—or increments—in the levels of particular pollutants in clean air areas. 42 U.S.C. 7475(a)(3) (permit requirement), 7473 (definition of increment). Another requirement is that the facility must not cause or contribute to air pollution exceeding any NAAQS or other "applicable emission standard or standard of performance" under the Act. 42 U.S.C. 7475(a)(3).

To prevent significant deterioration of air quality in a clean air area, a facility also may not "be constructed * * * unless * * * the proposed facility is subject to the best available control technology [BACT] for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility." 42 U.S.C. 7475(a)(4); see *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 407 (D.C. Cir. 1979). BACT is defined under the Act, in pertinent part, as

> an emission limitation based on the maximum degree of reduction of each pollutant * * * emitted from * * * any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility.

42 U.S.C. 7479(3). Thus, BACT is an "emission limitation" that must be "based on the maximum degree of reduction * * * achievable" for the facility, as determined by the permitting agency and taking into account the specified factors.

In determining what is BACT for a given source, permitting authorities commonly follow the "top-down" approach. Pet. App. 13a (citing EPA, *New Source Review Workshop Manual* (Draft 1990)). Under that approach, "the applicant ranks all available control technologies in descending order of control effectiveness. The most stringent technology is BACT unless the applicant can show that it is not technically

feasible, or if energy, environmental, or economic impacts justify a conclusion that it is not achievable." Pet. App. 13a.

The Act directs state permitting authorities to keep EPA informed of every PSD permit application and "of every action related to the consideration of such permit." 42 U.S.C. 7475(d)(1). Although EPA often offers comments to state permitting authorities on permit applications, EPA does not become more formally involved in PSD permit decisions in the vast majority of instances. Two provisions of the Act, however, authorize EPA to enforce the statutory PSD requirements. Section 113(a)(5) provides that if EPA "finds that a State is not acting in compliance with any requirement or prohibition" of the Act "relating to the construction of new sources or the modification of existing sources," 42 U.S.C. 7413(a)(5), EPA may (A) "issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies," (B) "issue an administrative penalty order," or (C) "bring a civil action" in federal district court for an injunction or other relief. 42 U.S.C. 7413(a)(5). Section 167, which is directed solely to the PSD program applicable to new sources in clean air areas, provides that EPA "shall * * * take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of" the Act specifically intended to prevent significant deterioration. 42 U.S.C. 7477.

2. Teck Cominco Alaska, Inc. operates the "Red Dog Mine" in northwest Alaska, which is the largest producer of zinc concentrates in the world. Pet. App. 3a. Many workers are housed within its boundaries, and native Alaskans reside in the nearby villages of Kivalina and Noatak. *Id.* at 4a; J.A. 166; R. 36-018, 46-001. Cominco first obtained a PSD permit from petitioner for the mine in 1988. Pet. App. 4a; J.A. 166. The mine produces its own electricity. In order to ensure

that emissions of nitrogen oxides (NOx) from its power generators remained within permissible limits, that permit, as later amended, included restrictions that limited the operations of the mine's five original diesel-fired power generators (designated MG-1 through MG-5) and one generator added later (designated MG-6). J.A. 78-79, 166-167, 194-195.

In 1996, Cominco initiated an expansion project to increase zinc production by 40%. Pet. App. 4a; R. 85-007; J.A. 167. The State of Alaska provided just under half of the funding. R. 85-007. The project was to increase the mine's workforce from 406 to 476. *Ibid.* Because the expansion would significantly increase emissions of air pollutants (including up to 1,100 additional tons per year of NOx) from the power generators, Cominco was required to apply for a new PSD permit. Cominco submitted its application in June 1998. Pet. App. 4a; J.A. 167-169. As amended in 1999, Cominco's application sought permission to build a new generator (designated MG-17) to add to the six existing ones. Pet. App. 4a; J.A. 167, 196. Cominco argued that petitioner should determine that BACT for that generator is a technology known as "Low NOx." Pet. App. 4a; J.A. 84.[1]

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[1] BACT review is required if modification of a particular facility would lead to a specified increase in emissions. See R. 33-016 (Table 2.3-1 showing Alaska PSD permit needed if NOx emissions will be increased by 40 tons per year or greater); 40 C.F.R. 51.166(b)(23)(i) (state SIPs must have 40-ton-per-year threshold for NOx increase). Initially, as a result of Cominco's planned increases in electricity generation from those generators that would lead to increased emissions, there was disagreement about the content of a BACT determination for MG-5 and the need for a BACT determination for MG-1, MG-3, and MG-4. See J.A. 128-129. In October 1999, Cominco revised its proposal to install Low NOx on those generators and thereby increase electricity production while not increasing emissions. See J.A. 149. The revision required Cominco to abide by the emission limitations in the pre-existing permits for those generators. See p. 9, *infra*. The case now concerns only the BACT limitation on the new generator, MG-17.

Petitioner's staff initially disagreed with Cominco's BACT proposal, concluding that a different and more stringent technology, selective catalytic reduction (SCR), should be required as BACT. J.A. 108, 196; Pet. App. 4a. SCR is similar to the catalytic converter technology used in automobiles. See, *e.g.*, 65 Fed. Reg. 35,430, 35,470 nn.100-101 (2000). In May 1999, however, petitioner released a draft PSD permit decision granting Cominco permission to build MG-17 with Low NOx—rather than SCR—installed on it. See Pet. App. 4a; J.A. 55-95. Purporting to follow the "top-down" approach (see pp. 3-4, *supra*), petitioner acknowledged that SCR would provide the most stringent level of control, while also being "technically and economically feasible" on MG-17. J.A. 61-62, 65, 83-84, 283-284. In particular, petitioner noted that the costs of SCR (variously estimated at that time to be between $1586 and $5643 per ton of NOx removed) were "well within what [petitioner] and EPA consider[] economically feasible." J.A. 84. Nevertheless, petitioner proposed to select the less effective Low NOx as BACT for MG-17 due solely to "other considerations." J.A. 65 n.1. Those "other considerations" consisted of Cominco's proposal to retrofit some of its existing generators with Low NOx as well. See note 1, *supra*; J.A. 87-88; Pet. App. 4a.

In July 1999, EPA, following up on comments submitted by the National Park Service (NPS), which was concerned about the effect of increased NOx emissions on air quality and vegetation at Cape Krusenstern National Monument and Noatak National Preserve, raised concerns with petitioner about its draft permit decision. Pet. App. 4a-5a; J.A. 96-98, 257, 284-285. EPA pointed out that petitioner itself had found that SCR offered "the most stringent level of control" and was "economically and technologically feasible." J.A. 96. And EPA reminded petitioner that "the PSD program does not allow the imposition of a limit that is less

stringent than BACT" on MG-17, "even if equivalent emission reductions are obtained by imposing new controls on other emission units." J.A. 97; see Pet. App. 5a.

After receiving EPA's comments, petitioner issued a revised draft permit decision dated September 1999. Petitioner again found SCR to offer the most stringent level of control, to be technologically feasible, and not to be eliminated by consideration of environmental and energy impacts. J.A. 107, 287. The revised decision also acknowledged that "the emission reductions achieved by the applicant's proposal to retrofit the existing, unmodified engines * * * cannot be used to temper the stringency of BACT" on MG-17—*i.e.*, that BACT had to be determined for MG-17 alone, without regard to controls petitioner might choose to place on other generators. J.A. 111-112, 286.

The revised draft decision nonetheless continued to state that Low NOx qualified as BACT for MG-17, purporting to base that determination on the costs of SCR, which it now found to be only $2100 per ton of NOx removed. Pet. App. 5a, 14a-15a; J.A. 113, 117, 286-288. The revised draft asserted that the costs of SCR were "significantly higher" than those associated with "recent BACT decision[s] for similar installations," although petitioner acknowledged that it had imposed BACT costs of up to "$7,000 per ton of NOx removed" on other sources. J.A. 115-116; R. 29-052. The revised draft hypothesized that Cominco "would probably buy power from a rural Alaskan utility" if it did not generate its own power and stated that the cost increase of SCR would be "a disproportionate cost increase when viewed as an electric utility." J.A. 116. Petitioner concluded its analysis:

> Another perhaps *better way* to determine if the cost of BACT is excessive, is for the applicant to present detailed financial information showing its effect on the operation. However, the applicant did not present this information. Therefore, *no judgment can be made as to the*

> *impact* of [the costs of SCR] on the operation, profitability, and competitiveness of the Red Dog Mine.

J.A. 116 (emphasis added).

EPA again submitted detailed comments to petitioner. See J.A. 118-130, 288-291. EPA's view was that petitioner's BACT determination for MG-17 was "clearly erroneous" and not "supported by * * * available information." J.A. 129. EPA emphasized, for example, the complete absence of facts establishing that "requiring Cominco to install and operate the more effective control strategies would have any adverse economic impacts upon Cominco specifically." J.A. 127.

In October 1999, the parties met to discuss the pending PSD permit. Pet. App. 5a; J.A. 292. Many outstanding issues were ultimately resolved. J.A. 294. For example, Cominco now "agreed to restrict the emission increases associated with MG-5 to avoid modification and BACT review" of that generator. J.A. 197. Although only the validity of petitioner's determination of BACT for the MG-17 generator remained in dispute, it was an issue of significance. With SCR, the MG-17 generator would emit only 53 tons of NOx per year. With Low NOx, MG-17 would emit 531 tons of NOx per year—a 10-fold difference. J.A. 100, 198.

After further correspondence and discussions, see J.A. 136-140, 292-294, EPA issued a "Finding of Noncompliance and Order" to petitioner. Pet. App. 5a, 26a-37a; J.A. 294-296. Invoking Section 113(a)(5) of the Clean Air Act, EPA found that petitioner would violate the requirements of the Act and the Alaska SIP if it issued the permit as then drafted. Pet. App. 35a; J.A. 295-296. In a cover letter, EPA explained that petitioner's "record simply does not support its decision that BACT for * * * MG-17 is low NOx controls." J.A. 150. EPA noted that petitioner's own analysis "indicates that SCR is technically feasible." J.A. 149. EPA also "d[id] not believe that the cost-effectiveness analysis in the final technical analysis report demonstrates that the installation of

SCR is economically infeasible" and noted that the costs of SCR "are well within the range of costs EPA has seen permitting authorities nationwide accept as economically feasible for NOx control, except where there are compelling site-specific factors that indicate otherwise." J.A. 150. EPA stated, however, that it remained "available to review and consider any additional information or analyses * * * to support a determination that SCR is not BACT." J.A. 150, 296-297. Similarly, pursuant to Section 167 of the Act, EPA's order directed petitioner not to permit construction of Cominco's MG-17 generator "unless [petitioner] satisfactorily documents why SCR is not BACT." Pet. App. 36a.

Later that same day, and notwithstanding EPA's order, petitioner issued a PSD permit with an emission limit on MG-17 based on a determination that Low NOx constituted BACT. Pet. App. 5a; J.A. 254, 297-298. Under the permit, the pre-existing emission limitations for the existing generators MG-1 through MG-6 were "retained" unchanged. J.A. 232; see J.A. 156 (2259 tons combined total for MG-1, MG-3, MG-4, and MG-5), 233 (limits for MG-2 and MG-6). The permit included no requirement that petitioner install Low NOx on any of those generators, although petitioner had the right both before and after the permit decision to do so to remain within the pre-existing emission limitations while producing more electricity. See J.A. 139.

There was one other significant departure from the September 1999 revised draft permit. Compare J.A. 194-211 with R. 29-042 to 29-055. Cominco still had not submitted any information on, and petitioner by its own admission therefore could make "no judgment" about, SCR's impact "on the operation, profitability, and competitiveness of the Red Dog Mine." J.A. 207, 299. Nonetheless, petitioner's analysis purported to find "the foremost consideration to judge economic impacts of SCR" to be "the direct cost of SCR technology and its relationship to retaining the Mine's

world competitiveness." J.A. 208. Petitioner concluded that "[t]o support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region, [petitioner] has rejected [SCR] controls based on excessive economic cost—$2.9 million capital cost, with annualized costs approaching $635,000." J.A. 208; see J.A. 298-299.

In early February 2000, EPA issued a finding of noncompliance based on petitioner's final December 1999 permit and BACT determination. Pet. App. 5a; J.A. 256-258, 299-300. On the same day, invoking Sections 113(a)(5) and 167 of the Act, EPA issued an "Administrative Order" to Cominco not to commence construction of MG-17 until it obtained a valid PSD permit. See Pet. App. 38a-50a; J.A. 301. In March 2000, EPA issued an "Amended Administrative Order" accommodating Cominco's request to conduct some limited, weather-sensitive construction. See Pet. App. 51a-64a; J.A. 302. In April 2000, EPA withdrew the original December 10, 1999, Order on the ground that "after [petitioner] issued the permit prohibited by the Order, the Order did not impose any continuing prohibitions or obligations applicable to [petitioner]." Pet. App. 19a; J.A. 300. EPA did not, however, withdraw the orders that generally prohibited Cominco from doing construction work on MG-17.

3. Petitioner and Cominco filed petitions for review of EPA's findings of noncompliance and orders. The Ninth Circuit held that the EPA's orders were final and that it therefore had jurisdiction under 42 U.S.C. 7607(b)(1). Pet. App. 18a-23a. Applying the test for finality in this Court's decision in *Bennett* v. *Spear*, 520 U.S. 154 (1997), the court held that EPA's orders were its "last word" on whether Low NOx is BACT for MG-17 and that "rights or obligations" of the parties were determined by the orders because "[t]he effect of the February 8 Order [to Cominco] is to halt construction at Cominco's Red Dog Mine facility at a considerable cost of both time and money to Cominco." Pet.

App. 20a. The court also noted that "legal consequences [would] flow" if Cominco chose to continue construction despite the orders because, if EPA instituted proceedings to enforce its orders in district court, "Cominco and its employees would be subject to criminal and civil penalties for the violation of its Orders, as well as for the violation of the [Clean Air Act]." *Id.* at 21a.

On the merits, the court denied the petitions. Pet. App. 1a-16a. The court noted that the enforcement powers EPA relied upon depend on EPA's finding either that the State is "not acting in compliance with any *requirement*" of the Clean Air Act under Section 113(a)(5) or that a proposed facility "does not conform to the *requirements* of" the Act under Section 167. *Id.* at 7a-8a (emphasis added) (quoting 42 U.S.C. 7413(a)(5) and 7477). The court observed that, under the Act, a State may issue a PSD permit to construct a new facility only if the proposed facility is "subject to the best available control technology for each pollutant." *Id.* at 8a. The court concluded that BACT is therefore a "requirement" of the Clean Air Act under both Section 113(a)(5) and Section 167 and that EPA's finding that petitioner had failed to subject MG-17 to BACT authorized EPA to issue orders under those Sections. *Id.* at 8a-9a.

Petitioner argued that the Act grants it discretion in determining what constitutes BACT, because the Act defines BACT as a limitation "based on the maximum degree of reduction of each pollutant * * * *which the permitting authority*, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, *determines* is achievable for [the] facility." Pet. App. 9a (emphasis added) (quoting 42 U.S.C. 7479(3)). The court agreed that "the state has discretion to make BACT determinations as the permitting authority." *Id.* at 10a. But it explained that "neither Section 113(a)(5) nor Section 167 contains any exemption for [Clean Air Act] requirements

that involve the state's exercise of discretion." *Id.* at 11a. The court concluded that "[i]t does not follow from the placement of initial responsibility with the state permitting authority that its decision is thereby insulated from the oversight and enforcement authority assigned to the EPA in other sections of the statute." *Ibid.*

The court also rejected the argument that, even if EPA has authority to reject a state BACT determination, EPA acted arbitrarily and capriciously in this case. See Pet. App. 13a-16a. The court found that the administrative record—which "all the parties effectively agreed * * * was adequate to resolve the issues on appeal"—supported EPA's finding of noncompliance. *Id.* at 7a. The court held that petitioner's own permit record "shows that (1) Cominco failed to meet its burden of demonstrating that SCR was economically infeasible; and (2) [petitioner] failed to provide a reasoned justification for its elimination of SCR as a control option." *Id.* at 16a. The court noted that petitioner's "apparent motivation for the elimination of SCR— appreciation for Cominco's contribution to the local economy"—is "uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority—to protect states from industry pressure to issue ill-advised permits." *Ibid.*

SUMMARY OF ARGUMENT

I. The court of appeals rejected EPA's argument that it did not have jurisdiction in this case because EPA's orders were not "final action" and therefore were not subject to review under 42 U.S.C. 7607(b)(1). Upon further consideration, the government now believes that the court of appeals did have jurisdiction. EPA's orders embodied EPA's considered and final judgment on whether petitioner had adequately justified its conclusion that Low NOx was the best available control technology for the MG-17 generator. The orders also determined legal rights and obligations, because they in effect invalidated petitioner's permit, pursuant to

which Cominco could have otherwise begun construction of the MG-17 generator.

II. A. On the merits, EPA's orders were based on authority granted to EPA in Sections 113(a)(5) and 167 of the Clean Air Act, 42 U.S.C. 7413(a)(5) and 7477, to prohibit construction of a new source when a State has failed to comply with a "requirement"—or the new source would not conform to a "requirement"—of the PSD program. The statutory BACT provisions constitute such a requirement. They mandate that permits for specified new sources (which include Cominco's MG-17) require use of the "best available control technology," 42 U.S.C. 7475(a)(4), which in turn is defined as "an emission limitation based on the maximum degree of reduction of each pollutant" that the "permitting authority * * * determines is achievable" for the facility, "taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. 7479(3).

B. Petitioner's core argument is that a State complies with the BACT provisions so long as it makes a determination—any determination—of emission levels under the rubric of BACT. That contention is inconsistent with the statutory terms, which do not merely allow a state permitting authority to determine whatever limit on emissions it wants, but instead require it to determine the "maximum degree of reduction in each pollutant * * * achievable" for the facility, taking into account specified factors. 42 U.S.C. 7479(3). If a State has not actually determined the "maximum reduction" that is "achievable," or if a State has employed an arbitrary methodology or relied on unsupported factual premises, the State has not complied with the BACT requirement. Although a State has substantial scope for exercising judgment and weighing competing considerations in making a BACT determination, that scope is not unlimited. If a State acts outside the scope of permissible judgment,

EPA may exercise the authority Congress granted it to issue a stop-construction order.

Petitioner's argument that a State has sole discretion to determine BACT would also undermine the statutory scheme. Congress vested EPA with enforcement authority in order to protect national interests in ensuring compliance with Clean Air Act requirements—interests that transcend state boundaries. Clean Air Act requirements were imposed in order to protect not only residents of the State that houses a new facility, but also residents of neighboring States into which the air pollution from that facility may migrate. Moreover, Congress wanted to limit the substantial competitive disadvantage that States that imposed reasonable BACT and other requirements would face if other States could adopt unreasonably permissive standards.

C. Petitioner's other arguments that it has absolute discretion to make whatever BACT determinations it wants are unsound. Although petitioner holds out the prospect of state-court review of its permitting decisions, Congress in Sections 113(a)(5) and 167 of the Act deliberately gave EPA its own independent authority to protect the multistate interests in preventing the significant deterioration of air quality in clean-air areas. In any event, petitioner's concession that BACT requirements in its permits are subject to state-court review is inconsistent with its core argument that such requirements are solely a matter of discretion for the state permitting authority. Petitioner is also mistaken in contending that EPA enforcement of the BACT requirement is unnecessary because new sources must not exceed the allowable increases in emission (increments) under the Clean Air Act. Although the increment requirement sets a maximum level of pollution from new facilities in the aggregate, the separate BACT requirement was included specifically to ensure that emissions from *each* new facility are reduced to the maximum extent achievable for the facility.

EPA review is also consistent with the statutory scheme of cooperative federalism. Under the PSD program, state permitting authorities have substantial latitude to exercise their own judgment about what constitutes BACT. Congress also, however, gave EPA substantive authority to ensure compliance with the BACT requirement where a State acts outside that area of reasonable judgment and discretion. It is petitioner's view, which would deprive EPA of *any* significant role in the BACT process, that violates the principles of cooperative federalism.

D. If there is any doubt about the meaning of the Clean Air Act in this case, EPA's construction of the Act to require permitting authorities to make reasonable BACT determinations is entitled to deference under *Chevron U.S.A, Inc.* v. *NRDC*, 467 U.S. 837 (1984). In conferring authority on the EPA to make findings and issue orders to ensure compliance with the Act's requirements, Congress necessarily conferred authority on EPA to construe and apply the Act. EPA's longstanding view that the Act requires BACT determinations to be reasonable was embodied in its orders and the administrative record in this case, as well as in notice-and-comment rulemaking and guidance to the States over the years.

III. Petitioner argues that, if EPA does have statutory authority to act on the basis of a State's unreasonable BACT determination, EPA nonetheless erred in finding that petitioner's BACT determination in this case was unreasonable. That factbound issue falls outside the question of statutory authority presented in the certiorari petition.

In any event, EPA correctly concluded that petitioner unreasonably determined that Low NOx was BACT was unreasonable. It is not disputed that the use of SCR on MG-17 would result in much lower emissions than would the use of Low NOx. Petitioner conceded that SCR was feasible based on energy and environmental impacts. Although petitioner

purported to rely on the greater costs of SCR in rejecting it as BACT, petitioner also acknowledged that it had been provided with no information concerning the effects of those greater costs on Cominco's mining operation, and that accordingly "no judgment can be made as to the impact of [the costs of SCR] on the operation, profitability, and competitiveness" of the mine. J.A. 207. EPA correctly found that petitioner's decision to base its BACT determination on a bare desire to save money for Cominco, unsupported by any evidence that doing so would in turn substantially affect Cominco's operations at the mine or the neighboring communities, was unreasonable.

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION IN THIS CASE

The court of appeals held that EPA's orders in this case were "final action" and thus reviewable under 42 U.S.C. 7607(b)(1). See generally *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578 (1980). The court rejected EPA's arguments that the orders were non-final. Upon further consideration, the government now believes that the court of appeals correctly found that it had jurisdiction in this case.

1. It is well-settled that myriad "pragmatic considerations" are involved in a finality determination. See, *e.g.*, *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-243 (1980). The finality of EPA's Orders turns on two factors that were highlighted in *Bennett* v. *Spear*, *supra*. Under *Bennett*, "[a]s a general matter," a final agency action (1) must be one that "mark[s] the 'consummation' of the agency's decisionmaking process," rather than one that is "merely tentative or interlocutory [in] nature," and (2) it "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 177-178. See *Whitman*, 531 U.S. 477-479.

The first of the *Bennett* conditions is satisfied here, as the Ninth Circuit concluded. Pet. App. 20a. The second *Bennett* condition is also satisfied given the nature of the orders in this case. The Act required Cominco to obtain a permit and be subject to BACT prior to construction. 42 U.S.C. 7475(a)(1). Absent EPA's orders, petitioner's permit would have removed those obstacles to Cominco's construction of the MG-17 generator. The orders, however, "effectively invalidated" the state permit. Pet. App. 18a. They precluded Cominco from constructing the generator and from asserting its compliance with the state permit as a defense in any enforcement proceeding. Moreover, as the court of appeals noted, once EPA issued its stop-construction orders, Cominco was faced with the threat of penalties for their violation. *Id.* at 21a; see 42 U.S.C. 7413(b)(2) (civil penalties possible for violations of a "requirement or prohibition of any * * * order * * * issued * * * under" the Act), 7413(c) (criminal penalties possible for knowing violation of "any order under [Section 113(a)]" or "an order under section [167]"). Accordingly, the orders "alter[ed] the legal regime," *Bennett*, 520 U.S. at 178, and they constituted "final action of the Administrator" under 42 U.S.C. 7607(b)(1).

2. The court of appeals' jurisdictional conclusion is consistent with the Sixth Circuit's conclusion involving a similar order in *Allsteel, Inc.* v. *EPA*, 25 F.3d 312, 315 (6th Cir. 1994) (noting that EPA's order "directed Allsteel to stop all construction—a new obligation, not one directly imposed by statute").[2] Compare *Acker* v. *EPA*, 290 F.3d 892 (7th Cir. 2002) (order that identified past violations and directed company to comply with law in the future not final action); *Asbestec Constr. Servs., Inc.* v. *EPA*, 849 F.2d 765 (2d Cir. 1988) (order that identified past violations of the Act, di-

[2] Although the Sixth Circuit's opinion does not specify the nature of the federal-state dispute, the briefs in *Allsteel* reveal that it included the validity of Tennessee's BACT determination.

rected the recipient to provide certain information, and required compliance with regulations in the future not final action); but cf. *Solar Turbines, Inc.* v. *Seif*, 879 F.2d 1073 (3d Cir. 1989) (holding, prior to 1990 expansion of civil penalties to cover violations of orders under 167, that pre-enforcement review of stop-construction order was unavailable).

After the court of appeals decided this case and this Court granted certiorari, the Eleventh Circuit in *TVA* v. *Whitman*, No. 00-15936, 2003 WL 21452521 (June 24, 2003), expressly disagreed with the Ninth Circuit's jurisdictional holding in this case. See *id.* at *16. The Eleventh Circuit did not disagree with the Ninth Circuit's conclusion that, as a statutory matter, Section 307(b)(1), 42 U.S.C. 7607(b)(1), would authorize pre-enforcement review of a stop-construction order such as that at issue here. The court held, however, that the Act "is unconstitutional to the extent that mere noncompliance with the terms of [an EPA order] can be the sole basis for the imposition of severe civil and criminal penalties." 2003 WL 21452521, *at* *19. In the court's view, the statutory scheme "deprives the regulated party of a 'reasonable opportunity to be heard and present evidence' on the two most crucial issues: (a) whether the conduct underlying the issuance of the [order] actually took place and (b) whether the alleged conduct amounts to a [Clean Air Act] violation." *Id.* at *18. The Eleventh Circuit rejected the contention that EPA could remedy any procedural deficiency "by voluntarily undertaking an adjudication prior to the issuance of an [order]," finding that "there is simply no room for administrative discretion on this [procedural] point" in the Act. *Ibid.* The Eleventh Circuit concluded that EPA orders "lack finality because they do not meet prong two of the *Bennett* test." *Id.* at *19.

The Eleventh Circuit's holding is mistaken, for at least two reasons. First, contrary to the Eleventh Circuit's apparent conclusion, see, *e.g.*, 2003 WL 21452521, at *4, the underlying merits of an EPA order are always subject to judicial review—either on petition for review, as in this case or, if not, in a subsequent action brought by EPA to enforce the order. See 42 U.S.C. 7607(b)(2) ("Action of the Administrator with respect to which review could have been obtained under [42 U.S.C. 7607(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement."). The Act's authorization of penalties for violation of EPA "orders" is naturally read to refer only to *valid* orders. In any event, such a narrowing construction would certainly be appropriate to avoid holding a portion of the Act unconstitutional.[3]

Second, the Eleventh Circuit erred in holding that EPA cannot provide for administrative procedures that would remedy any constitutional deficiency. The mere fact that Congress has failed to specify what procedures must be followed before EPA may issue an order does not preclude EPA from adopting procedures that are constitutionally adequate. The Due Process Clause does not require that Congress specify adequate procedures every time it entrusts to an agency the responsibility to make a determination; the Clause requires only that, in each case, adequate procedures are provided. This Court has long held that an agency has

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[3] The Eleventh Circuit noted that EPA may issue orders under Section 113(a)(5) "on the basis of any available information," 42 U.S.C. 7413(a)(5), and the court appears to have believed that that language mandated an exceptionally lax standard of judicial review of EPA orders. See 2003 WL 2145251, at *5, *16, *18. The "any available information" clause, however, does not alter the standard of review when EPA's orders are challenged; it simply means that EPA need not apply judicial rules of evidence in determining whether there has been a violation of the Act that warrants issuance of an order. Cf. 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for purposes of imposing an appropriate sentence."); Sentencing Guidelines § 1B1.4 (similar).

general authority to provide appropriate process, even when a statute does not specify that that process must be used. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978) (noting "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure"); *Cameron* v. *United States*, 252 U.S. 450, 460-463 (1920). The Eleventh Circuit erred in rejecting that principle. Moreover, neither the Due Process Clause nor the Administrative Procedure Act requires a formal evidentiary hearing in all circumstances, and Congress contemplated that many EPA orders under the Clean Air Act would be issued in less formal proceedings. See *PPG Indus., Inc.* 446 U.S. at 587-589.

3. The Eleventh Circuit's sole reason for holding that the EPA order in that case was nonfinal and thus unreviewable was that the Act's provision for such orders to be backed by civil and criminal penalties was unconstitutional. For the reasons given above, the Act's provisions for EPA orders do not violate the Due Process Clause.[4] Accordingly, the Eleventh Circuit's finality conclusion was erroneous, and the court of appeals in this case correctly held that the EPA orders were reviewable under Section 307(b)(1).[5]

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[4] Petitioner has not presented any question in this case about the adequacy of EPA's procedures under the Due Process Clause or the APA.

[5] The Clean Air Act itself vests courts of appeals with original jurisdiction to review certain enumerated actions of EPA and "any other final action" it takes. 42 U.S.C. 7607(b)(1). Thus, apart from constitutional or prudential limitations such as standing, "finality" is the only jurisdictional inquiry under the Act. See *Allsteel*, 25 F.3d at 314. Other environmental statutes, such as the Clean Water Act, 33 U.S. 1251 *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, generally do not comprehensively provide for judicial review, and review accordingly often takes place in district courts pursuant to the APA. The APA provides that an agency action may be "final" yet still statutorily unreviewable on other grounds, such as if the statute under which the agency acts "preclude[s] judicial review." 5 U.S.C. 701(a)(1). Courts have generally found that pre-enforcement review of EPA orders under those other environmental statutes is precluded within the meaning of the APA. See, *e.g.*, *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1426 (6th Cir. 1994); *Southern Pines Assocs.* v. *United States*, 912 F.2d 713, 716 (4th Cir. 1990); *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567, 568 (7th Cir. 1990); *Ross Incineration Servs.* v. *Browner*, 118 F. Supp. 2d 837, 843-845, 847 (N.D. Ohio 2000); *Amoco Oil Co.* v. *EPA*, 959 F. Supp. 1318, 1323-1324 (D. Colo. 1997). The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*, contains an express bar to pre-enforcement review. Cf. *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885 (8th Cir. 1977) (finding pre-enforcement review under the Clean Air Act precluded prior to the 1977 addition of the "any other final agency action" language to Section 7607(b)(1)).

II. THE CLEAN AIR ACT AUTHORIZES EPA TO ISSUE A STOP-CONSTRUCTION ORDER IF A STATE'S PSD PERMIT IS BASED ON AN ARBITRARY OR UNREASONED DETERMINATION OF BEST AVAILABLE CONTROL TECHNOLOGY

Sections 113(a)(5) and 167 of the Clean Air Act, 42 U.S.C. 7413(a)(5) and 7477, both grant EPA authority to issue stop-construction orders to enforce a "requirement" of the Act. Both parties agree that it is a requirement of the Act that a permitting authority determine the best available control technology for a proposed facility and include corresponding emission limitations in its PSD permit. EPA rested its Orders in this case on the premise that a State fails to conform to that requirement if it bases emission limitations in a permit on an unreasonable BACT determination. That conclusion is correct, and petitioner's arguments for a contrary interpretation—under which the Act requires permitting authorities to make a BACT determination but does not require them to do so reasonably—are mistaken.

A. Under The Plain Language Of Sections 113(a)(5) And 167, EPA Has Authority To Prevent Construction Of A Facility Under A Permit That Does Not Comply With Requirements Of The Clean Air Act

"[T]he starting point in a case involving construction * * * of a statute, is the language of the statute itself." *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 500 (1993). Two provisions of the Clean Air Act expressly authorized EPA's orders in this case.

1. Under Section 113(a)(5), "[w]henever * * * the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may * * * *issue an order* prohibiting the construction or modification of any major stationary source in any area to which such requirement applies." 42 U.S.C. 7413(a)(5) (emphasis added); see 42 U.S.C. 7411(a)(4) (defining "modification"). Under that provision, even when a State rather than EPA has authority to issue PSD permits—and even though the State's decision to grant a PSD permit would be subject to judicial review in state court—Congress granted EPA itself a substantive role in overseeing state implementation. Cf. Pet. Br. 23 ("There are many 'requirements' in the Act, including in the PSD provisions, that the EPA may enforce pursuant to Sections 113(a)(5) or 167."). Indeed, Congress expanded EPA's oversight role under Section 113(a)(5) in 1990 specifically to include enforcement of the Act's PSD requirements. See p. 32, *infra*. Thus, if EPA finds that a State decision to issue a permit does not comply with a requirement of the PSD provisions of the Act, EPA may issue a stop-construction order under Section 113(a)(5).

2. EPA's authority under Section 167 rests on a similar foundation. Under Section 167, "[t]he Administrator shall * * * take such measures, *including issuance of an order*,

* * * as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part" of the Act. 42 U.S.C. 7477 (emphasis added). The term "this part" refers to the provisions of the Act concerning prevention of significant deterioration of air quality in clean air areas. See 42 U.S.C. 7470-7492. Section 167 thus specifically gives to EPA—in addition to the States that have permitting authority under the Act—a substantive enforcement role with respect to construction or modification of facilities in clean air areas.

B. A Permitting Authority That Has Not Reasonably Determined The Maximum Degree Of Reduction In Pollution Achievable For A Facility Has Not Complied With The Act's BACT Requirement

EPA's ability to act in this case thus turns (under Section 113(a)(5)) on whether the Alaska permitting authority has complied with the Clean Air Act's "requirements" and (under Section 167) on whether Cominco's proposed facility would conform to the Act's "requirements." Section 165(a)(4) provides that "[n]o major emitting facility * * * may be constructed" in a clean air area "unless * * * the proposed facility is subject to the best available control technology." 42 U.S.C. 7475(a)(4). Petitioner concedes (Br. 22) that that provision imposes a "BACT requirement" that "a state-issued PSD permit contain a BACT limitation." EPA's order to stop construction therefore was authorized under Section 113(a)(5) if the State was "not acting in compliance with" the statutory BACT requirement when it issued the PSD permit, and EPA's order was authorized under Section 167 if Cominco's construction of its MG-17 generator with Low NOx would "not conform to" that requirement.

The core disagreement in this case concerns the nature of the BACT requirement. Both parties agree that a state permitting authority has the responsibility in the first in-

stance to determine what is the best available control technology for a given proposed facility. The government's submission is that the Act requires the state permitting authority to make its BACT determination reasonably within the parameters of the statutory standards, and that, when the state authority fails to do so, EPA may enforce the Act's requirements under Sections 113(a)(5) and 167. Petitioner's view is that the state permitting authority has "sole discretion" to impose whatever emission limitations it wants under the BACT label (Br. 27) and that EPA's authority under Sections 113(a)(5) and 167 therefore does not include *any* substantive review of whether the State's BACT determination is reasonable or justifiable. Petitioner's position is mistaken.

1. The BACT requirement is fleshed out in a statutory definitional provision. That provision does not merely require that a State determine the "best" emission limitation, without further specification—a standard that, even had it been employed, still would not necessarily mean that petitioner had unreviewable discretion. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 411-413 (1971) (grant of authority to administrator to determine "prudent" alternative to highway route does not grant unlimited discretion). Rather, BACT is defined in pertinent part as

> an emission limitation based on the maximum degree of reduction of each pollutant * * *, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [the] facility through application of production processes and available methods, systems, and techniques * * * for control of each such pollutant.

42 U.S.C. 7479(3). Thus, a PSD permit satisfies the BACT requirement if it provides for the "maximum degree of reduction of each pollutant" that "is achievable for [the] facility" through specific measures "for control of each such pollutant." That determination must "tak[e] into account energy, environmental, and economic impacts and other costs." The "permitting authority"—in this case, petitioner—is the entity that must make that determination, just as it must make all other determinations necessary to deciding whether a proposed PSD permit would comply with the Act.

2. Petitioner's core argument is that the statutory BACT requirement is satisfied so long as the permitting authority takes into account the specified factors and makes some determination about emission limitations, no matter how implausible. See Pet. Br. 22 ("The only 'BACT requirement' pertinent here is that a state-issued PSD permit contain a BACT limitation, determined by the State 'on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.'"); *id.* at 27 ("Congress * * * vest[ed] the States with *sole discretion* to decide what constitutes BACT.") (emphasis added). In petitioner's view, EPA may invoke Sections 113(a)(5) and 167 only to enforce the requirement that the state permitting authority recite that it is determining the best available control technology and "tak[ing] into account" the specified factors. In petitioner's view, that is all a state permitting authority must do to satisfy the statutory BACT requirement.

Petitioner's argument is inconsistent with the plain language of the BACT definition. Under that definition, there are at least two ways in which a permitting agency might recite that it is determining BACT and taking into account the specified factors while still failing to satisfy the statutory BACT requirement.

a. First, the Act does not require merely that a permitting agency make some determination of indeterminate content regarding desirable emission reductions. Rather, the agency must make a determination of the "maximum degree of reduction of each pollutant * * * achievable" by the

facility. Despite a permitting agency's incantation of the statutory BACT definition, the agency's decision might make clear that it has not actually determined the "maximum degree of reduction * * * achievable" by a facility. In such a case, although the permitting agency has made *some* determination, it has not made a determination *of BACT*.

For example, the permitting authority's reasoning may demonstrate that it applied some lower standard than the "maximum degree of reduction * * * achievable"—perhaps seeking only a degree of reduction that requires no new equipment installation, the least expensive reduction in emissions, or the like. Applying such a standard would violate the statutory BACT requirement regardless of whether the permitting agency designated it as a BACT determination.

Similarly, the state agency's decision may make clear that it was based on a desire to provide economic support to a particular company or facility by relieving it of the need to lower its emissions. Providing economic support through expenditure of state funds or exemption from purely state-law regulations may be a worthwhile state goal in a given case, but a State's decision that it wants to support an employer is not a determination of the "maximum degree of reduction" of pollutants "achievable" for the facility.

As is spelled out in additional detail below, see pp. 44-50, *infra*, EPA objected to the permit in this case because petitioner made the very kinds of errors outlined above. Petitioner did find that SCR is more expensive than Low NOx. But petitioner also acknowledged that, because Cominco "did not present" detailed financial information about the effect of the costs of SCR on its operations, "no judgement can be made as to the impact [of those costs] on the operation, profitability, and competitiveness of the Red Dog Mine." J.A. 207. Petitioner thus had no evidence concerning the effect of the costs of SCR on Cominco's operations or on

the local community. Indeed, petitioner pointed to no evidence supporting a conclusion that the higher costs would have *any* adverse effect. As a result, petitioner was not in a position to determine that SCR—which concededly would assure the "maximum degree of reduction" of NOx as a technological matter—would not be "achievable" for the MG-17 generator. At most, petitioner could determine that it wanted to provide additional economic "support" to the Red Dog mine. J.A. 208. But a State may not simply choose to support a local facility by relieving it of the requirement to use the *best available* control technology to reduce pollution. If it does so, EPA has authority under Sections 113(a)(5) and 167 to prohibit construction of the facility.

b. In addition, the permitting agency does not satisfy the Act's requirement that it make a genuine BACT determination based on the "maximum degree of reduction * * * achievable" merely by reciting a finding that a particular technology satisfies that standard, no matter how arbitrary or unreasoned that finding is. Congress's grant of authority to make a BACT determination was directed toward a particular purpose of fundamental importance under the Act—preventing significant deterioration of air quality in clean-air areas within the State and in other neighboring States. See 42 U.S.C. 7470(3) and (4). That purpose would not be advanced by a BACT determination that arbitrarily evaluated the evidence before the permitting authority or applied the statutory criteria in an arbitrary manner that excused the applicant from installing meaningful pollution controls. Accordingly, Congress's grant of authority to make BACT determinations is limited to the authority to make *reasonable* BACT determinations.

This Court reached an analogous conclusion in *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). In that case, medical care providers brought suit under 42 U.S.C. 1983 to challenge Medicaid reimbursement rates set by a State, on

the ground that the rates violated a federal statute requiring States to provide for payment for medicaid services "though the use of rates * * * *which the State finds* * * * *are reasonable and adequate*" to meet certain costs. 496 U.S. at 503. The Court rejected the argument that the only right granted by the statute that was enforceable under 42 U.S.C. 1983 was "the right to compel compliance with the[] bare procedural requirement[]" that the State recite a finding that its rates are reasonable. 496 U.S. at 513. Noting that such a construction "would render the statutory requirement[] of findings * * * essentially meaningless," the Court explained that "[i]t would make little sense for Congress to require a State to make findings without requiring those findings to be correct." *Id.* at 514. Accordingly, the statute imposed a meaningful requirement that could be enforced under federal law.[6]

Similarly here, it would make little sense to require a state permitting agency to "determine" the best available control technology if the agency could do so without concern for the accuracy or statutory legitimacy of its analysis. If a permitting agency used an arbitrary methodology or disregarded clear evidence of actual costs in determining what is BACT, then the agency has not made a reasonable BACT determination and it has not complied with the statutory BACT requirement. That would be the case, for example, if a permitting agency simply decided that any technology that

[6] The result in this case follows *a fortiori* from *Wilder*. *Wilder* involved the question whether the members of a particular class were intended to be beneficiaries of a right under a federal statute such that they could sue to enforce that right under Section 1983. As the Court concluded in *Gonzaga University* v. *Doe*, 536 U.S. 273, 283 (2002), the demanding standards governing implication of private rights of action under federal statutes apply to such uses of Section 1983 by private plaintiffs. No such demanding standard applies to the construction of EPA's express authority under Sections 113(a)(5) and 167 to enforce the requirements of the PSD provisions of the Clean Air Act.

imposes *any* economic cost—even one additional dollar—is not "achievable" for a facility, even though the facility is projected to be profitable and plainly could afford a modest additional cost for pollution control. Where, as in this case, a permitting authority has not made a reasonable determination of what is the best available control technology under the statutory standards, it has failed to comply with the statutory BACT requirement, and EPA has authority under Sections 113(a)(5) and 167 to issue a stop-construction order.

c. That does not mean that a permitting authority has no ability to exercise judgment and to weigh competing considerations when it makes a BACT determination. EPA itself has consistently recognized that the Clean Air Act gives state permitting authorities considerable latitude in making such determinations.[7] EPA has long taken the position that a State with an approved SIP "assumes primary responsibility for administering the PSD program," J.A. 268 (1983 EPA guidance document), and that "permitting decisions involve the exercise of judgment," J.A. 273 (1988 EPA guidance document). EPA also has recognized that "it is the state that must make the final decision on all issues relating to the specific permit" and that "[t]here is no suggestion in the Act's * * * provisions that EPA has authority to second-guess the state on matters that are a lawful and rational exercise of discretion properly conferred upon the state." J.A. 281 (quoting 1993 EPA guidance document).[8]

[7] See also, *e.g.*, Pet. App. 10a ("state has discretion to make BACT determinations"); *Northern Plains Res. Council* v. *EPA*, 645 F.2d 1349, 1358-1362 (9th Cir. 1981) (affirming BACT determination because permitting authority "exercised reasoned discretion"); *Alabama Power*, 636 F.2d at 409 ("permitting authority * * * may exercise reasonable discretion" in determining BACT).

[8] EPA recognized that scope of state authority in this case by making clear, for example, that petitioner could come into compliance by "satisfactorily document[ing] why SCR is not BACT for the Wartsila diesel generator." Pet. App. 36a, 48a, 61a. See also J.A. 150 (EPA is "available

Nonetheless, EPA too has enforcement responsibility under Sections 113(a)(5) and 167. Accordingly, EPA has consistently informed the States that it will exercise its authority under those provisions if a State's "BACT determination [is] not based on a reasoned analysis." J.A. 274 (1988 EPA guidance document). See also J.A. 282 (quoting 1993 EPA guidance document) (EPA may take action if a State has not "met all procedural norms, considered all available control technologies, and given a reasoned justification for the basis of its decision."); J.A. 281 (EPA may act "to ensure that the state exercises its discretion within the bounds of the law."). It has proven to be relatively rare that a state agency has put EPA in the position of having to exercise that authority.[9] But, if it does so, EPA may exercise its authority under Sections 113(a)(5) and 167 to remedy the failure.

3. a. Petitioner's argument that EPA has no authority to examine the substance of a State's BACT determination is also inconsistent with the structure and purposes of the Clean Air Act and, in particular, with its PSD provisions. Congress added those provisions in 1977. Under the 1977 amendments, as the Senate Report explained,

> [t]he Administrator's role is one of monitoring State actions. States have authority to issue construction permits to new major emitting facilities in clean air areas. The Administrator thus could go to court to stop a permit for activities which would exceed the increments of pollution or which otherwise did not comply with the requirements of this section, *including use of best available control technology*.

S. Rep. No. 127, 95th Cong., 1st Sess. 12 (1977) (emphasis added).[10] As is evident, legislators expressly contemplated, without qualification, that the BACT requirement would fall within EPA's responsibility to "monitor[] State actions." *Ibid.* The Report even explains *how* EPA should exercise its oversight role: "[t]he Administrator should tell the States the basis for his review. When asked, he should become involved at an early date in particularly difficult permit applications so that the States and localities will know of any potential differences." *Ibid.*[11] See also H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 153 (1977) ("The Administrator *shall issue orders* and seek other action to prevent issuance of an *improper* permit.") (emphasis added).

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to review and consider any additional information or analyses * * * to support a determination that SCR is not BACT").

[9] There are only two other reported judicial decisions that involve stop-construction orders because of faulty BACT determinations. See *Allsteel*, *supra* (recital only that there was faulty PSD permit, but record reveals that fault was in part in BACT determination); *Solar Turbines*, *supra*.

[10] Although the passage quoted in the text identifies one measure ("go[ing] to court") that EPA may take under 42 U.S.C. 7477 to prevent construction of a non-conforming facility, Section 7477 more generally authorizes EPA to "take such measures" as are necessary, specifically "including issuance of an order, *or* seeking injunctive relief."

[11] The record here shows that EPA followed this roadmap by communicating its concerns about Cominco's amended application. EPA's prompt actions here also belie predictions by petitioner and its *amici* that affirming the judgment below would necessarily allow EPA enforcement action initiated long after construction is completed. See, *e.g.*, Pet. Br. 35; Nat'l Envtl. Dev. Ass'n, et al. Br. 10; N.D., et al. Br. 15. This case, which involves *pre*-construction orders issued by EPA, furnishes no occasion to consider the circumstances under which EPA might appropriately act *post*-construction. Cf., *e.g.*, *United States* v. *Murphy Oil USA, Inc.*, 155 F. Supp. 2d 1117, 1123 (W.D. Wis. 2001) (rejecting source operator's reliance on state-issued PSD permit because operator failed to submit relevant information to permitting authority). As a matter of policy, EPA takes account of equitable concerns in issuing orders. See J.A. 273. District courts also may consider the equities in fashioning "appropriate relief," 42 U.S.C. 7413(b), and EPA's failure to act in a timely manner would in many cases be an important equitable factor for the court to consider. 42 U.S.C. 7413(b).

The legislative history of the 1990 amendments further confirms that Congress intended to give EPA a limited, but nonetheless substantive and source-specific role under the Clean Air Act. Contra Pet. Br. 33-34. Prior to 1990, EPA's authority under Section 113(a)(5) was limited to actions to remedy a State's noncompliance with a "plan provision" or other specified provisions of the Clean Air Act, and only in nonattainment areas. 42 U.S.C. 7413(a)(5) (1988). Under the 1990 amendments, Congress broadened Section 113(a)(5) to encompass a State's noncompliance with "any requirement" pertaining to new or modified major sources, including those located in clean air areas and therefore subject to PSD permits. H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. 1, at 391 (1990). Petitioner's restrictive construction would contradict Congress's purposeful expansion of EPA's authority. See *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").[12]

b. Congress had good reason to give EPA such enforcement authority. First, Congress has always recognized that, because air pollution moves easily across state lines, the Clean Air Act implicates interests that surpass those of any particular State. Indeed, Congress declared in a statutory finding that one of the purposes of preventing significant deterioration of air quality even in clean air areas was "to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan *to prevent significant deterioration of air quality for any other State.*" 42 U.S.C. 7470(4) (emphasis added). The House Report on the 1977 amendments that added the PSD program discussed the extensive evidence that "[a]ir is no respecter of political boundaries" and explained that "while

[12] Also in 1990, Congress enacted an operating-permit program under which EPA has even greater source-specific responsibilities than under the preconstruction programs. See 42 U.S.C. 7661-7661f.

emissions may not be 'significant' in the area of origin, when transported to another area and combined with pollutants from other areas, air quality may be drastically degraded." H.R. Rep. No. 294, 95th Cong., 1st Sess. 135 (1977). Accordingly, "[a] policy of prevention of significant deterioration which controls a new source's emissions to the maximum extent practicable will help minimize the transport and buildup of pollutants from one area to another." *Ibid.* To accomplish that goal, Congress did not give each individual State carte blanche to include whatever emissions limitations it wished in PSD permits, but instead required those limitations to be based on the "*maximum* degree of reduction in each pollutant" that is "*achievable*," 42 U.S.C. 7479(3) (emphasis added). And it gave EPA enforcement authority in Sections 113(a)(5) and 167 to protect the national interests that extend beyond those of any particular State. Compare *Arkansas* v. *Oklahoma*, 503 U.S. 91, 105-107 (1992).

Second, Congress intended that there be a level playing field among the States. The House Report on the 1977 amendments explained that "[t]here exists a strong incentive * * * for industry to 'shop around' for States or localities with large clean air resources and weak pollution control standards." H.R. Rep. No. 294, *supra*, at 133. An important congressional purpose in enacting the PSD program—including its BACT requirement—was to limit the "substantial competitive disadvantage" that could be faced by other States:

> Without national guidelines for the prevention of significant deterioration a State deciding to protect its clean air resources will face a double threat. The prospect is very real that such a State would lose existing industrial plants to more permissive States. But additionally the State will likely become the target of 'economic-environmental blackmail' from new industrial plants that will play one State off against another with threats to locate

> in whichever State adopts the most permissive pollution controls. In other words, without national guidance on prevention of significant deterioration, the very States demonstrating a concern for preserving existing clean air seriously risk having their economic base undermined.

Id. at 134. Congress therefore granted EPA authority to ensure that BACT decisions were justifiable.

C. Petitioner's Remaining Arguments That A BACT Determination Is An Entirely Subjective Or Discretionary Decision That Is Not Subject To Review Are Mistaken

1. Petitioner argues that its selection of BACT cannot be reviewed by EPA because "[d]etermining the 'best' control technology is like asking different people to pick the 'best' car," and "[s]ubstituting one decisionmaker for another may yield a different result, but not in any sense a more 'correct' one." Pet. Br. 24. In petitioner's view, "[b]ecause there is no 'correct' BACT determination for any particular source, the EPA cannot conclude that a State failed to include the 'correct' BACT limitation in a PSD permit." *Id.* at 24-25.

Petitioner's claim that there is no "correct" BACT determination for a particular source may or may not be right, depending on the facts. In this case, for example, it appears that both petitioner and EPA would agree that there are no more than two genuine candidates for BACT—Low NOx and SCR. Depending on the technology involved, there will likely be cases in which there is only one possibility and other cases in which there are several more.

In any event, insofar as petitioner's submission is that a state agency's BACT determination can never be said to be correct or incorrect, petitioner's own argument that its BACT determination is subject to review in state court contradicts that submission. According to petitioner (Br. 35), EPA or any other person could, "if it believed that the State had failed to adequately justify its final permit decision, challenge that decision through the State's [judicial] review

process." Indeed, petitioner argues that "the need [for EPA] to correct 'unreasoned' state determinations * * * is hardly compelling, given the availability of state administrative and judicial review addressed to just that possibility." *Id.* at 36.

Petitioner's insistence that there could be state-court review of a BACT determination is at war with its core contention that the determination of the best available control technology is no more ascertainable than an individual's personal taste for one car over another. If a BACT determination contains the degree of unfettered discretion that petitioner asserts, then state-court review of the determination would also be doomed. Cf. *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) ("[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'"). The prospect of state judicial review that petitioner holds out would be a chimera. In fact, however, a number of federal and state courts have reviewed BACT determinations that were made by EPA as permitting authority and by state agencies, and none has ever suggested that the matter was altogether committed to the permitting authority's discretion by law and therefore unreviewable. Cf. 5 U.S.C. 701(a)(2).[13]

Thus, petitioner is correct when it argues that a BACT determination can be arbitrary or otherwise contrary to law and hence subject to review by another body (state court, federal court, or EPA), and petitioner is incorrect when it

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[13] See *Northern Plains*, 645 F.2d at 1350-1352, 1358-1362 (EPA-issued permit); *Sur Contra La Contaminacion* v. *EPA*, 202 F.3d 443, 448 (1st Cir. 2000) (EPA as permitting authority); *Citizens for Clean Air* v. *EPA*, 959 F.2d 839 (9th Cir. 1992) (EPA as permitting authority, with State agency as delegatee); *Plumbers & Steamfitters, Local 52* v. *Alabama Dep't of Envtl. Mgmt.*, 647 So. 2d 793 (Ala. Civ. App. 1994) (state permitting authority); *In re Pennsauken Solid Waste Mgmt. Auth.*, 569 A.2d 826 (N.J. Super. Ct. App. Div. 1990) (EPA as permitting autnority, with state agency having been delegated some authority).

argues to the contrary that the determination of BACT is so subjective, discretionary, or indeterminate that it can never be said to be correct or incorrect. Congress anchored the BACT requirement in terms—"best available," "maximum degree of reduction * * * achievable," "production processes" and "techniques * * * for control," etc.—that impose substantive limitations on a permitting authority. If a state permitting authority applies those terms in an unjustifiable fashion, EPA may invoke Sections 113(a)(5) and 167.

2. Petitioner's claim that a determination of BACT is entirely subjective or discretionary is also based on a faulty understanding of the relationship among the various requirements of the PSD program. To obtain a PSD permit, the owner of a proposed facility must demonstrate that its emissions will not "cause, or contribute to" emissions in excess of an "increment"—a "maximum allowable increase or maximum allowable concentration for any pollutant." 42 U.S.C. 7475(a)(3). That "increment" requirement is independent of the requirement that the facility be "subject to the best available control technology for each pollutant." 42 U.S.C. 7475(a)(4). Accordingly, even if a proposed facility will not cause emissions in excess of the increments—indeed, even if all new facilities in the State will indisputably not cause emissions in excess of the increments—the state agency must still determine what is the "maximum degree of reduction of each pollutant * * * achievable" for each individual facility and limit its emissions accordingly.

The increment provisions of the Act do place an overall limit on the number and types of permits a State can grant in the aggregate. But, contrary to petitioner's argument that a State may determine BACT simply by dividing up the allowable increments among facilities as it sees fit, see Pet. Br. 17, 24, compliance with the overall increment limitations does

not establish that the State has satisfied the separate BACT requirement for each facility.[14]

3. Similarly unsupportive of petitioner's restrictive reading of EPA's oversight authority is Section 165(a)(8) of the Clean Air Act. See Pet. Br. 25. That provision contains another PSD permit requirement, one with limited applicability to "a source which proposes to construct in a class III area"—a classification that no State has ever used. 42 U.S.C. 7475(a)(8). That Congress required EPA affirmatively to "approve[] the determination" of BACT in a permit for that discrete subset of new sources (*i.e.*, sources in Class III areas that pollute in excess of the applicable increment for Class II areas) before the permit becomes effective does not mean it intended to bar EPA oversight of BACT determinations affecting all other clean air areas. Rather, it was logical for Congress to provide EPA with a general oversight role with respect to PSD permits while at the same time to increase the level of oversight, through a requirement of prior approval, in the special circumstances in Section 165(a)(8).

4. Petitioner contends (Br. 27) that precluding any substantive EPA review of a State's BACT determination would carry through the "basic division of responsibilities" between the federal and state governments that this Court

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[14] Petitioner errs in arguing that BACT determinations are categorically different from "objective" decisions about whether a facility will satisfy the increments. Nearly every part of a PSD permit decision involves the exercise of sometimes complex judgment on the part of the permitting authority, such as the determination of whether emissions from the new source would "cause, or contribute" to pollution in excess of the applicable increment. 42 U.S.C. 7475(a)(3); see 42 U.S.C. 7410(j) (owner of facility must show "to the satisfaction of the permitting authority" that facility will satisfy performance standards, including increments). Yet it is uncontested that "EPA has authority under the [Act] to prevent or to correct a violation of the increments." *Alabama Power*, 636 F.2d at 361; Pet. Br. 25.

recognized in *Train*. That case concerned the limits on a State's authority under the Clean Air Act to fashion an implementation plan (SIP) to reach the national ambient air quality standards that EPA had set. The Court explained that "[t]he Act gives the [EPA] no authority to question the wisdom of a State's choices of emission limitations [in a SIP] if they are part of a plan which satisfies the [Act's] standards." 421 U.S. at 79. Petitioner argues that a similar principle should grant States "sole discretion" (Br. 27) to determine BACT for a facility.

Even on its own terms, *Train* does not support petitioner's argument. *Train* recognized that, although States have a primary role in determining how to satisfy national ambient air quality standards, the EPA retains "a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." 421 U.S. at 79. It is just such a secondary, backstop role that EPA has played in this case. Cf. *id.* at 93-94 n.28 (noting that Congress "charged [EPA] with the administration of the Act[] and made [it] ultimately responsible for the attainment and maintenance of the national standards"). That scheme is in keeping with the plan of "cooperative federalism," *New York* v. *United States*, 505 U.S. 144, 167-168 (1992), that Congress put in place in the Clean Air Act. Indeed, it is petitioner's view, which would deprive EPA of *any* significant role in the BACT process, that violates the principles of cooperative federalism embodied in the Act.

In any event, *Train* addressed the provisions of the Act concerning state plans for implementing national ambient air quality standards set by EPA and EPA's ability to review such plans. See 42 U.S.C. 7410(a)(2). In that context, Congress gave the States substantial discretion to develop their own mix of emission limitations to meet the EPA-specified national standards in light of the States' own "particular

situation[s]," 421 U.S. at 79, while at the same time granting EPA authority to reject a state plan if the State has acted outside the range of discretion accorded it by proposing a plan that does not meet the national standards. This case concerns entirely different, source-specific requirements of the Act that were added in 1977, after *Train*, and bear no similarity in wording, structure, or context to the provisions at issue in *Train*. Nonetheless, the principles of cooperative federalism play out here as well. In the PSD program, Congress granted the States substantial latitude to exercise the judgment necessary to determine BACT under the governing standards in the Act, while also vesting EPA with authority in Section 113(a)(5) and Section 167 (which was especially directed toward the PSD program) to enforce the BACT requirement in the unusual case in which a State acts outside the range of permissible judgments.

5. Finally, petitioner argues (Br. 36) that EPA's exercise of authority in this case would "improperly shift[] the burden of persuasion from the EPA to the States," because federal-court review of whether EPA's action is supportable will replace state-court review of whether petitioner's decision was supportable. Petitioner's quarrel, however, is not with EPA's authority in this case, but with Congress's decision to enact Sections 113(a)(5) and 167, and thereby to vest EPA with oversight authority in cases in which a State has failed to comply with the Act's requirements. It naturally follows from those provisions that there will be at least some cases in which a state permitting authority's failure to comply with the requirements of the Act will be potentially subject to several alternative avenues of review: (a) review in state court, (b) exercise by EPA of its authority under Sections 113(a)(5) and 167 to issue a stop-construction order, followed by federal court review of EPA's action, or (c) an EPA suit for injunctive relief directly in federal court under those same provisions. Congress's enactment of Sections 113(a)(5)

and 167 demonstrates that it specifically intended the latter two forms of review, and petitioner's complaints about those features of the Act should be addressed to Congress.

Petitioner itself acknowledges that such parallel avenues of review properly may take place under Sections 113(a)(5) and 167. Petitioner notes that there are "many [Clean Air Act] requirements, including in the PSD provisions, that the EPA may enforce pursuant to Sections 113(a)(5) or 167." Pet. Br. 23. It is common ground that EPA may act, for example, if "the State issued a permit allowing emissions to exceed available increments," see Pet. Br. 25, even though decisions about whether a facility will exceed the increments may involve complex and controversial judgment calls. Petitioner thus acknowledges that in such a case, the state permitting agency's permit would be reviewable, as here, in alternative ways: either by judicial review in state court, or by EPA's exercise of its independent enforcement responsibility. If such a scheme is workable in the case of a state permit that allows emissions in excess of the allowable increments, it is equally workable here. Nor is it difficult for a federal court, reviewing an EPA order, to take into account that the state permitting authority retains discretion and that EPA's action may be sustained only if its determination that the state agency acted outside its zone of reasonable discretion is supported. See Pet. App. 10a; cf. *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 78 (1991) (courts must recognize "wide range of reasonableness" within which unions act in evaluating certain duty of fair representation claims).

D. The Court Should Defer To EPA's Interpretation That It Is A "Requirement" Of The Clean Air Act That States Make Reasonable BACT Determinations

If there is any doubt about the meaning of the Clean Air Act in this case, EPA's construction of the Act to require permitting authorities to make reasonable BACT determinations is entitled to deference under *Chevron U.S.A, Inc.* v. *NRDC*, 467 U.S. 837 (1984).

1. This Court has "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of * * * adjudication that produces regulations or rulings for which deference is claimed." *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). Just such a delegation is at issue here. EPA acted in this case pursuant to the express conferral of authority in Sections 113(a)(5) and 167 to make findings and issue orders when a State fails to "act[] in compliance with any requirement" of the Act, 42 U.S.C. 7413(a)(5), or a facility fails to "conform to the requirements of" the PSD program, 42 U.S.C. 7477. Indeed, Congress provided that States must transmit copies of PSD permit applications to EPA "and provide notice to [EPA] of every action related to the consideration of such permit," 42 U.S.C. 7475(d)(1), in part so that EPA may effectively exercise its authority under Sections 113(a)(5) and 167. Congress necessarily intended that EPA would have to construe and apply the Clean Air Act in taking action under those express delegations, and EPA's construction of the Clean Air Act underlying the orders is therefore entitled to *Chevron* deference.

Moreover, as explained above, see pp. 16-17, *supra*, EPA's orders in this case have "the force of law," a factor that this Court has found to support *Chevron* deference for agency interpretations. *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); see *Mead*, 533 U.S. at 230. Those orders are not analogous to "interpretations contained in policy statements, agency manuals, and enforcement guidelines" that "are beyond the *Chevron* pale." *Mead*, 533 U.S. at 234.

2. EPA's construction of the Clean Air Act to require permitting authorities not merely to make *some* BACT determination, but also to make *reasonable* BACT determinations, was embodied in the orders in this case. In those or-

ders, EPA invoked Sections 113(a)(5) and 167 as the sources of its authority,[15] and the orders were based on the premise that a State's BACT determination must be reasonable and supported by the record. See J.A. 150 ("[Petitioner's] record simply does not support its decision that BACT for * * * MG-17 is low NOx controls rather than SCR."). Additionally, the administrative record here is replete with EPA's interpretation of the scope of Sections 113(a)(5) and 167 as granting EPA authority to enforce the statutory BACT requirement when state permitting authorities make arbitrary or unreasoned BACT determinations. J.A. 137, 148-149, 261-262, 292-293, 295-296, 302. Accordingly, EPA's construction of the Act in these orders to require that BACT determinations be reasonable is entitled to *Chevron* deference.

3. Other factors that this Court has discussed in deciding whether an agency's interpretation of a statute is entitled to *Chevron* deference are also present here. EPA's position is "longstanding" and reflects a "careful consideration * * * over a long period of time," *Barnhart* v. *Walton*, 122 S. Ct. 1265, 1270, 1272 (2002), and it has remained "consistent[]," *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993). EPA guidance documents dating from as long ago as 1983 reflect the same basic interpretation as the Agency employed here. See p. 29, *supra*. Moreover, EPA has presented that same interpretation in notice-and-comment rulemaking proceedings approving various States' PSD programs. See 57 Fed. Reg. 28,095 (1992); 58 Fed. Reg. 10,961 (1993); 63 Fed. Reg. 13,796 (1998). For example, in responding to comments that Virginia should not receive EPA's approval to run a PSD program, EPA assured the public that "it has a responsibility to insure that all States properly implement their preconstruction permitting pro-

[15] Pet. App. 26a, 29a-30a, 35a-36a (¶¶ 1-2, 19-20, 46-47); *id.* at 38a, 41a-42a, 47a, 49a (¶¶ 1-2, 18-19, 42, 48-50); *id.* at 51a, 54a-55a, 60a, 62a (¶¶ 1-2, 18-19, 42, 48, 51-52).

grams." *Id.* at 13,796. At the same time, however, EPA reiterated the need to accord appropriate deference to the States: "EPA may not intrude upon the significant discretion granted to states * * * and will not 'second guess' state decisions." *Id.* at 13,797. As EPA noted, it "will review the process followed by the permitting authority in determining [BACT] * * * to ensure * * * any determination * * * was made on reasonable grounds properly supported on the record." *Ibid.*

4. Finally, the Agency's interpretation addresses an issue within its expertise and one with "importance * * * to administration of the statute." *Barnhart*, 122 S. Ct. at 1272. The question whether a State's determinations of the best available control technology for new facilities are subject to EPA oversight is not only of great importance to residents of the State itself. It also is of substantial importance to residents of neighboring States that may suffer from increased air pollution, and still other States that must compete for new facilities with a State that has adopted an arbitrarily lenient standard for BACT. If there is any doubt whether the Clean Air Act requires that a State make its BACT determination reasonably, EPA's construction of the Act to encompass that requirement should be conclusive.[16]

[16] This Court has made clear that development of an agency's views in a formal rulemaking proceeding is not necessary for *Chevron* deference. See, *e.g.*, *Edelman* v. *Lynchburg Coll.*, 122 S. Ct. 1145, 1150 (2002); *Mead*, 533 U.S. at 231. Nor, in the absence of rulemaking, is a formal adjudication a prerequisite to *Chevron* deference. See *id.* at 231-232 & n.13 (discussing *Nations Bank* v. *Variable Annuity Life Ins. Co.*, 513 U S. 251, 256-257 (1995). Formal adjudication under 5 U.S.C. 554 and 556 is designed to guarantee certain procedures for the determination of *facts* in particular types of cases; it does not have a direct bearing on how an agency interprets applicable *law*. See also *Martin* v. *OSHRC*, 499 U.S. 144, 156-157 (1991) (according deference to interpretation reflected in administrative complaint). Under the Clean Air Act, Congress has contemplated that EPA will render decisions on numerous issues without a

III. THE COURT OF APPEALS CORRECTLY SUSTAINED EPA'S CONCLUSION THAT PETITIONER MADE AN UNREASONABLE BACT DETERMINATION

A. Petitioner argues (Br. 39-48) that even if EPA has statutory authority to issue a stop-construction order based on a state permit's failure to comply with BACT, it erred in doing so in this case. That issue falls outside the question of statutory construction presented in the certiorari petition (Pet. i):

> Whether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska—which had been delegated permitting authority under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*—in conflict with decisions of this Court and other federal courts of appeals establishing the division of federal-state jurisdiction under the Act and similar statutory programs.

The petition fairly poses the question whether EPA has statutory authority under Sections 113(a)(5) and 167 to review the substance of state BACT determinations and to act accordingly. The petition does not, however, present any question concerning whether, if EPA does have such authority, it was properly exercised in this case. Although the petition later, in a single sentence in the "Statement," mentions that the court of appeals "went on to hold that the EPA's issuance of the orders [in this case] was not arbitrary or capricious," Pet. 12, it contains no further mention of that point. Moreover, it could not fairly be said that EPA's analysis of the particular factual record in this case is "in

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formal adjudication. See *PPG Indus.*, 446 U.S. at 587-589. But even if EPA's interpretation were ineligible for *Chevron*-level deference, it has the "power to persuade" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), because of the Agency's "thoroughness," "validity of * * * reasoning," and "consistency."

conflict with decisions of this Court and other federal courts of appeals establishing the division of federal-state jurisdiction under the Act and similar statutory programs." Pet. i. Accordingly, the question whether EPA's orders in this particular case were adequately supported by the record is not fairly included in the question presented and should not be addressed by this Court. *Lexecon, Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 n.5 (1998).

B. In any event, EPA properly found that petitioner had not reasonably justified its determination that Low NOx was the best available control technology for MG-17. See Pet. App. 13a-16a.

1. The record is uncontradicted that SCR "is the most stringent control technology available for large diesel-fired generators," J.A. 80, and requiring it would result in "the maximum degree of reduction of" nitrogen oxide. 42 U.S.C. 7479(3). With SCR, MG-17 would emit only 53 tons of NOx per year. J.A. 198. It would emit 10 times that level—531 tons per year—under a permit that allowed Low NOx. *Ibid.*

Petitioner asserts that, "because Cominco had agreed to install Low NOx on *all* its generators," petitioner's "permit decision was expected to result in *lower* overall NOx emissions than would occur if SCR * * * were installed on only the MG-17 generator." Pet. Br. 13; see also *id.* at 4, 42 n.12; Cominco Br. 4; North Dakota, et al. Amicus Br. 14. That contention is mistaken, and it is inconsistent with the conclusions that petitioner itself reached in issuing the permit.

First, petitioner concluded in its Final Technical Report that, "[o]f the Wartsila generators at the Red Dog Mine, only unit MG-17 requires BACT," J.A. 232, and whatever low emission parts Cominco may install on "existing, unmodified engines * * * *is not a consideration of the BACT review.*" J.A. 199 (emphasis added); see also J.A. 111-112 (same). That conclusion was correct. The plain terms of the Clean Air Act require that a State determine and apply the best

available control technology for *each* "major emitting facility" that is "constructed," 42 U.S.C. 7475(a)(1). Neither a facility owner nor a State may avoid the BACT requirement for a new facility by arguing that some other control technology will be used on some other facility.

Second, the permit issued by petitioner plainly allows much *greater* emissions of nitrogen oxide than a permit requiring the use of SCR on the MG-17 generator. The permit "retain[ed]" the limit on nitrogen oxide emissions from the pre-existing generators that had already been imposed in the operating permits for those generators. J.A. 239. Indeed, those pre-existing limits had to be retained, without regard to any BACT determination for any generator, old or new, so that the facility would not exceed the applicable increments—a requirement that petitioner concedes to be binding on the States and enforceable by EPA. J.A. 237. Therefore, Cominco must ensure that the existing generators remain within the pre-existing limits, regardless of what pollution control device—Low NOx or SCR—is required on MG-17. Cominco may of course choose to install Low NOx on the existing generators in order to increase electricity production without exceeding the pre-existing limits on emissions of nitrogen oxide. Nothing in the permit, however, *requires* Cominco to do so, much less to reduce their overall emissions to offset added emissions from MG-17. As a result, petitioner's determination that Cominco may use Low NOx rather than SCR on MG-17 plainly allows substantially greater emissions from the Red Dog Mine.

2. There is no suggestion in the record that petitioner should have rejected SCR on account of "energy" or "environmental * * * impacts." 42 U.S.C. 7479(3). See, *e.g.*, J.A. 200-203 (rejecting Cominco's arguments concerning such impacts); see also Pet. Br. 40 ("ADEC discounted Cominco's claim that energy or environmental impacts warranted eliminating SCR."). In fact, petitioner specifically rejected

Cominco's efforts to "reduce the stringency of BACT" by reliance on the mine's compliance with other air quality standards, J.A. 200, and even found that "it is likely that the NOx emission reductions resulting from [SCR] will improve workplace conditions." J.A. 201.

3. Nor does the record on which petitioner's decision was based reveal any reasoned basis to conclude that a limitation based on SCR was not "achievable for such facility" due to "economic impacts and other costs." 42 U.S.C. 7479(3). Petitioner and its engineer initially concluded that SCR was "economically feasible" for MG-17. J.A. 65. Further evincing SCR's economic feasibility is the world-wide pervasiveness of that technology. See, *e.g.*, J.A. 102 ("SCR has been installed on similar diesel-fired engines throughout the world."); J.A. 234 ("The Department has permitted projects [in Alaska] requiring SCR."); J.A. 289-291.[17]

Petitioner asserts that its BACT determination was correct because the cost of SCR—approximately $2,100 per ton of NOx removed, see J.A. 204—was higher than the cost of controls in recent BACT determinations it had made of $0 to $936 per ton of NOx removed. Pet. Br. 40. See J.A. 205-206. Not even Cominco, however, had placed reliance on those "installations," see R. 44- 011, 45-034, 45-043, and petitioner itself commented that "[t]he cited examples of engines permitted in Alaska without requiring SCR are not valid exam-

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[17] Because SCR is so pervasive, including in cold climates, petitioner's selected excerpts (see Br. 44-45) from EPA's *New Source Review Workshop Manual* do not help its cause. A fair reading of the cited portion of the guidance is that the more a "control alternative" is "effectively employed in the same source category," the harder it is generally to eliminate that level of control on the basis of an "economic impact." R. 71-115. That reading is confirmed by petitioner's own acknowledgment that Cominco bore the burden of showing "compelling and atypical energy, environmental, or economic * * * circumstances specific to a facility [that] constrain it from using [] the most effective technology"—a burden that Cominco failed to discharge. J.A. 178.

ples as they either took place over 18 months ago or were not used for similar purposes." J.A. 233-234; see also R. 21-018 ("[N]one of the decisions cited by Cominco are similar to the case at hand.").

Moreover, even if the "recent BACT decisions" cited by petitioner had any instructive value,[18] the record does not support petitioner's dismissal of higher-cost examples within the State. J.A. 115, 205. As petitioner itself noted with respect to a prior permit decision, "the Yukon Pacific Corporation permit included a gas/diesel-fired boiler and heaters with costs at $2,900 and $7,000, respectively, per ton of NOx removed," and the estimated cost of SCR for Cominco falls well below either figure. R. 21-019.[19]

Ultimately, petitioner rested its BACT analysis on an analogy to rural electric utilities in Alaska. Petitioner stated that "[i]f [Cominco] did not have a powerhouse, it would probably buy power from a rural Alaska utility." J.A. 206. Petitioner reasoned that, because what it termed a "cursory review" revealed that the average cost of electricity for such rural utilities is 15 cents per kilowatt hour and the use of SCR would increase that by 3 cents, SCR "would be equivalent to a 20% increase in the electric rate of the facility." J.A. 206. Petitioner concluded that "this is a disproportionate cost increase *when viewed as an electric utility*." J.A. 206 (emphasis added). Cominco, however, is not a rural utility and it does not compete with rural utilities. Moreover, the economic impact of a requirement that a rural Alaska utility use SCR on a new generator could be far different than the economic impact of a requirement that Cominco do so on the new generator at its mine. Indeed, no facts exist to suggest that the "economic impact[]" of the incrementally higher cost of SCR on the world's largest producer of zinc concentrates would be anything like its impact on a rural, non-profit utility that must pass costs on to a small base of individual consumers. 42 U.S.C. 7479(3); J.A. 116, 207.

[18] Because the record does not reveal the dates of those BACT decisions, it is not clear whether they have any precedential relevance. See R. 22-031 to 22-033. As petitioner itself noted, "18 months is the timeframe over which BACT decisions are rendered stale under both state and federal PSD regulations." R. 21-014. Relying on other BACT decisions standing alone is also problematic because, as both EPA and petitioner pointed out, cost-effectiveness is not always calculated or published. See J.A. 127, 205.

[19] While this analysis is from an internal memorandum, petitioner incorporated that analysis by reference into its final response to comments. See J.A. 236 n.31.

4. The best demonstration that petitioner unreasonably selected Low NOx over SCR for MG-17 is found in its own final BACT determination:

> The Red Dog Mine plays a unique and continuing inpact on the economic diversity of this region. Therefore, the Department has chosen to consider the direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts for the foremost consideration to judge economic impacts of SCR. To support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region, the Department has rejected Selective Catalytic Reduction controls based on excessive economic cost * * *.

J.A. 208. Assuming that "retaining the Mine's world competitiveness as it relates to community socioeconomic impacts" could properly be the "foremost consideration" in petitioner's BACT determination, the record provides nc support whatever for the proposition that requiring the use of SCR would either affect the "Mine's world competitiveness" or have significant "community socioeconomic impacts." Petitioner acknowledged that, although the "better way to determine if the cost of BACT is excessive" would be "for the applicant to present detailed financial information showing its effect on the operation," Cominco "did not present this

information." J.A. 207. Petitioner therefore acknowledged that "no judgment can be made as to the impact of [the costs of SCR] on the operation, profitability, and competitiveness of the Red Dog Mine." J.A. 207.[20] If it was impossible to make a judgment about the effect of requiring SCR on the "operation, profitability, and competitiveness" of the mine, it was also impossible to make a resulting judgment about its effect on the mine's "world competitiveness" or local "socio-economic impact[]." J.A. 207. Petitioner could not possibly have articulated a "rational connection between the facts found and the choice made" because Cominco did not provide the requisite "facts" to depart from the "maximum degree of [NOx] reduction." 42 U.S.C. 7479(3); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

As the court of appeals appropriately observed, petitioner's BACT decision underscores one of the reasons why Congress intended EPA to have oversight authority—"to protect states from industry pressure to issue ill-advised permits." Pet. App. 16a. Based on this "available information" from the record, 42 U.S.C. 7413(a)(5), EPA acted reasonably in issuing the finding of noncompliance to petitioner and the administrative orders to Cominco to prevent the construction of a major new source of air pollution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[20] Petitioner cannot now suggest that it considered Cominco's bare assertion of an impact to be sufficient (Pet. Br. 41); it contemporaneously stressed an inability "to verify [the] claim." R. 22-002. Additionally, while the Red Dog Mine is an important employer in the region (Pet. Br. 9, 10, 46), there is no record evidence that requiring SCR would compromise even a single job.

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APPENDIX

1. Section 101 of the Clean Air Act, 42 U.S.C. 7401, provides in relevant part:

§ 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

* * * * *

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

* * * * *

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

2. Section 107 of the Clean Air Act, 42 U.S.C. 7407, provides in relevant part:

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in each State.

* * * * *

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, * * * the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national

primary or secondary ambient air quality standards for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

* * * * *

(B) Promulgation by EPA of designations

(i) * * * [T]he Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable * * * *

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). * * * *

3. Section 110 of the Clean Air Act, 42 U.S.C. 7410, provides in relevant part:

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall * * * adopt and submit to the Administrator * * * a plan which provides for imple-

mentation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator * * * a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. * * * *

(2) * * * * Each such plan shall —

(A) include enforceable emission limitations and other control measures, means, or techniques * * * as may be necessary or appropriate to meet the applicable requirements of this chapter; * * *

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter; * * * *

* * * * *

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator —

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum

criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

* * * * *

(J) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

4. Section 113 of the Clean Air Act, 42 U.S.C. 7413, provides in relevant part:

§ 7413. Federal Enforcement

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which

the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may * * *

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. * * * * During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by—

(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

(3) EPA enforcement of other requirements

Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promgulated, issued, or approved under those provisions or subchapters, * * * the Administrator may—

(A) issue an administrative penalty order in accordance with subsection (d) of this section,

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders

An order issued under this subsection * * * shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable

specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. * * * * No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or applicable implementation plan promulgated or approved under this chapter.

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may–

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected

source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty or not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. * * * *

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter * * * including, but not limited to, a requirement or prohibition of any rule, order, waiver, or permit promulgated, issued, or approved under this chapter * * * *

(3) Whenever such person attempts to construct or modify a major stationary source in any area with repect to which a finding under subsection (a)(5) of this section has been made.

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, * * * and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. * * * *

* * * * *

(e) Penalty assessment criteria

(1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. * * * *

5. Section 116 of the Clean Air Act, 42 U.S.C. 7416, provides:

§ 7416. Retention of State authority.

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

6. Section 160 of the Clean Air Act, 42 U.S.C. 7470, provides:

§ 7470. Congressional declaration of purpose

The purposes of this part [Part C—Prevention of Significant Deterioration of Air Quality] are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate [sic] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air[], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic , or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

7. Section 161 of the Clean Air Act, 42 U.S.C. 7471, provides:

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

8. Section 162 of the Clean Air Act, 42 U.S.C. 7472, provides in relevant part:

§ 7472. Initial classifications

* * * * *

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

9. Section 165 of the Clean Air Act, 42 U.S.C. 7475(a), provides in relevant part:

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility * * * may be constructed in any area to which this part applies unless-

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission

limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subjection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrative has approved the determination of best available control technology as set forth in the permit.

* * * * *

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the

Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I areas which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particular matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the face that the change in air quality resulting from emissions from such facility will not cause or

contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

10. Section 167 of the Clean Air Act, 42 U.S.C. 7477, provides:

§ 7477. Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

11. Section 169 of the Clean Air Act, 42 U.S.C. 7479, provides in relevant part:

§ 7479. Definitions

For purposes of this part —

* * * * *

(3) the term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Clean Air Amendments of 1990.

12. Section 7607(b) of the Clean Air Act, 42 U.S.C. 7607(b), provides in pertinent part:

(b) Judicial review

(1) * * * A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the

Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. * * *

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. * * *

No. 02-658

IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

No. 02-658

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

EPA cannot dispute that Congress expressly intended that the State make the discretionary determination of BACT in this case. Instead, EPA argues that its general enforcement powers trump Congress's carefully-crafted scheme of cooperative federalism, and require EPA to veto a State's BACT determination whenever EPA believes the State has acted unreasonably. Its argument, however, rests on a straw-man: its incorrect assertion that EPA must be able to intervene because Alaska desires to make unreasoned or arbitrary decisions. As a government agency charged with protecting the public, Alaska's Department of Environmental Conservation ("ADEC") does not argue that it can behave unreasonably or arbitrarily in carrying out any of its responsibilities, and it is confident it did not do so here. But ADEC's inherent duty to act reasonably is not a separate requirement of the CAA to be enforced by EPA any more than it is a separate, unstated requirement of any other law ADEC implements.

As set forth in the plain language of the CAA, once EPA has approved a State's implementation plan Congress trusted the State to make certain discretionary determinations—including BACT—and trusted EPA to make other determinations, subject in both cases to appropriate *judicial* review to ensure that discretion is exercised properly. EPA's argument that it may decide by fiat whether a sovereign state agency has behaved arbitrarily or unreasonably, subject only to limited judicial review of EPA's decision, cannot be squared with the statutory language or its underlying purposes.[1]

I. EPA HAS NO AUTHORITY TO VETO A STATE BACT DETERMINATION THAT WEIGHS THE STATUTORY FACTORS.

A. Claims Of Arbitrary Or Unreasoned Decision-making Are Addressed Through Normal Administrative And Judicial Review, Not By EPA Fiat.

The plain language of the statute provides that BACT is to be determined by "the permitting authority"—here, the State—"on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). EPA identifies *no* statutory language that Alaska allegedly violated. Instead, EPA argues that its general enforcement authority allows it to veto any state BACT determination it believes is "arbitrary" or "unreasoned." But the statute does not say that. Although ADEC has never argued that it can act arbitrarily or unreasonably in anything

[1] Alaska agrees with EPA that the orders at issue here were "final action" within the meaning of 42 U.S.C. § 7607(b)(1), and that the Court has jurisdiction. *See* EPA Br. 16-17. The constitutional issue decided in *TVA* v. *Whitman*, 2003 WL 21452521, at *18 (11th Cir. 2003), has not been raised in this case. But EPA's lack of an adjudicative process as highlighted by the Eleventh Circuit in that case underscores why review of state BACT determinations should be made through the usual state review process rather than by EPA fiat. *See* Alaska Br. 37-38.

it does, that inherent duty is not an unstated "requirement" of the CAA that Congress gave EPA the power to enforce. Determinations of whether agencies have acted arbitrarily in carrying out discretion afforded by statutes are made by *courts* exercising their traditional function of judicial review.

Alaska has never suggested that, because BACT is "strictly a State and local decision," S. Rep. No. 95-127, at 31 (1977), a State may "impose whatever emissions limitations it wants under the BACT label." EPA Br. 24. EPA confuses the State's "sole" discretion, Alaska Br. 27, with "absolute," "unreviewable" or "unfettered" discretion. EPA Br. 14, 35. When any interested party (including EPA) believes that a State's BACT determination is unreasoned or arbitrary, it may challenge that determination through a state administrative and judicial review process. *See* Alaska Br. 19, 34. State courts routinely review BACT and other determinations made by States under the CAA.[2] EPA does not dispute that it can pursue this remedy. *See United States* v. *AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994) (noting that EPA could have challenged CAA permit through state review process); *cf.* 40 C.F.R. § 72.72(b)(5)(iv) (EPA may intervene in state Acid Rain permit appeals).[3] Nor does it dispute that

[2] *See, e.g.*, *Plumbers & Steamfitters Local 52* v. *Alabama Dep't of Envtl. Mgmt.*, 647 So. 2d 793, 795-796 (Ala. Civ. App. 1994) (BACT determination); *Bowers* v. *Pollution Control Hearings Bd.*, 13 P.3d 1076, 1098 (Wash. Ct. App. 2000) (RACT determination); *Color Comm., Inc.* v. *Illinois Pollution Control Bd.*, 680 N.E.2d 516, 519-520 (Ill. App. Ct. 1997) (determination of "source"); *In re Crown/Vista Energy Project*, 652 A.2d 212, 218-219 (N.J. Super. Ct. App. Div. 1995) (emissions rate determination).

[3] Here, the state review process would have been available to EPA had it participated in the public comment process on Cominco's application. *See* Alaska Br. 34-35. Although ADEC did consider EPA's belated input, it is difficult to understand how EPA can characterize its actions as "prompt," EPA Br. 31 n.11, when it failed to submit comments during the comment period.

the remedy adequately protects the interests it would vindicate. Indeed, EPA will not even approve a state PSD permit program unless the program provides "an opportunity for state judicial review." 61 Fed. Reg. 1800, 1882 (1996).

EPA has authority to enforce certain "requirements" of the CAA, *see* 42 U.S.C. §§ 7413(a)(5), 7477, but the only pertinent "requirement" here is that the state-issued permit contain a BACT limitation determined by the State after considering the applicable factors. It is not a specific requirement *of the CAA* that the State make what EPA would believe to be a non-arbitrary BACT determination, any more than it is a specific requirement of any other substantive statute that an agency act non-arbitrarily in exercising discretion. As it does whenever it affords discretion to a state or federal agency, Congress rightly assumed that States—just like EPA when it exercises discretionary authority—could be trusted to make reasoned BACT determinations. Like their federal counterparts, state agencies must engage in reasoned decisionmaking. *See, e.g., Bering Straits Coastal Mgmt. Program* v. *Noah*, 952 P.2d 737, 741 (Alaska 1998). That duty, however, is a basic principle of administrative law with constitutional underpinnings.[4] To the extent such principles are codified, they are most commonly set forth in procedural statutes such as the Administrative Procedure Act ("APA"). *See, e.g.*, 5 U.S.C. § 706(2)(A); Alaska Stat. § 44.62.570(b)(3).

A judicial finding that an agency acted arbitrarily or capriciously is not a finding that the governing statute itself has

[4] *See ICC* v. *Union Pac. R.R.*, 222 U.S. 541, 547 (1912) (order set aside if agency exercised its authority in "an unreasonable manner"); Senate Comm. on the Judiciary, S. Doc. No. 79-248, at 39 (Comm. Print 1945) (categories of judicial review of agency action "were first established by the Supreme Court as the minimum requisite under the Constitution and have also been carried into State practice, in part at least, as the result of the identical due process clauses of the [Constitution]") (citations omitted).

been violated. Those are two different inquiries. *See, e.g.*, *NRDC* v. *Thomas*, 838 F.2d 1224, 1253 (D.C. Cir. 1988) ("While we do not by any means find that the EPA's conclusion is in violation of statutory authority, we are unable to conclude that it rests upon 'reasoned decisionmaking.' "); *compare* 5 U.S.C. § 706(2)(A) (proscribing "arbitrary or capricious" action) *with id.* § 706(2)(C) (proscribing action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). Although the governing statute may afford an agency discretion, the judiciary may still determine that the discretion was not exercised consistently with inherent principles of administrative procedure. Thus, the recognition that a state review process is available is not "at war" with the notion that there is no objectively "correct" BACT determination. *See* EPA Br. 34-36.

It is traditionally the role of courts, not federal agencies, to determine whether state agencies have acted arbitrarily or capriciously. *See Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276 (1997) (Kennedy, J.) ("[T]he elaboration of administrative law * * * is one of the primary responsibilities of the state judiciary."). When Congress intends to upset that traditional balance, it says so expressly, as it has done elsewhere in the CAA. *See* 42 U.S.C. § 7543(b)(1)(A) (EPA may deny waiver from certain standards if EPA finds that State's waiver determinations are "arbitrary or capricious").

Moreover, if EPA were correct here, it would be able to veto not only state agencies but also state courts, which could well reach different conclusions from EPA on the reasonableness of an agency action upon judicial review. Such extraordinary federal agency authority over state judicial and executive branches should not be inferred without express direction from Congress. *Cf. Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (quotations omitted).

Indeed, when Congress wanted to give EPA *any* role in the PSD permitting process—and specifically in the determination of BACT—Congress did so explicitly. *See* Alaska Br. 25-26 & n.6. EPA argues that Section 165(a)(8)—which requires EPA approval of state BACT determinations in one specified instance not applicable here, *see* 42 U.S.C. § 7475(a)(8)—is merely a requirement of "prior approval" in "special circumstances" that does not prevent EPA from exercising "general oversight" authority for other BACT determinations. EPA Br. 37. The CAA, however, provides that EPA "*shall*" take measures "to prevent the construction or modification of a major facility which does not conform to the requirements" of the Act's PSD provisions. 42 U.S.C. § 7477 (emphasis added). Thus, if it were in fact a "requirement" of the Act that each BACT determination conform to what EPA would consider reasonable, prior EPA approval of *each* determination would be required. There is no reason Congress would specify approval of certain state BACT determinations in Section 165(a)(8) if EPA already had the mandatory duty to approve every such determination.

B. There Is No "Correct" BACT Determination.

Because BACT in any given case will depend on how the permitting authority weighs the pertinent factors in view of the comments of the public and other agencies, it cannot be said that a particular BACT determination is "correct" or "incorrect." Different decisionmakers may weigh the factors differently under different policies and thus yield different results, but one result is not more "correct" than another. If the State sets a limitation based on consideration of the applicable factors, it has complied with the BACT "requirement."[5]

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[5] EPA erroneously asserts that the BACT "requirement" is no different in nature than the requirement that a facility's emissions may not exceed the increments. EPA Br. 37 n.14. Although the latter may involve the "sometimes complex judgment" of permitting authorities, *id.*, the CAA does not give permitting authorities broad discretion to determine whether the increments would be violated. In fact, EPA requires all air quality modeling to be conducted under an EPA-approved model. *See* 40 C.F.R. § 51.166(*l*). By contrast, the CAA on its face gives the States "broad flexibility" to determine BACT. S. Rep. No. 95-127, at 31.

EPA misses this fundamental point. It argues that a State violates the BACT requirement when it is "clear" that the State "has not actually determined the 'maximum degree of reduction * * * achievable' by a facility." EPA Br. 26. BACT, however, is not simply the "maximum degree of reduction * * * achievable" as a purely technological matter, but rather what the State determines is the maximum achievable after specifically "taking into account" non-technological "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). EPA says a State would necessarily violate the statute if it found as BACT a technology that offers "a degree of reduction that requires no new equipment installation," or "the least expensive reduction in emissions." EPA Br. 26. But because "[t]he weight assigned to such factors is to be determined *by the State*," S. Rep. No. 95-127, at 31 (emphasis added), it may well be that economic or other cost considerations would lead a State validly to make such determinations. Indeed, sometimes BACT is no control technology whatsoever. *See, e.g.*, Cert. Rec. 71-100.[6]

This fact, among others, distinguishes this case from *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), which EPA cites as "analogous." EPA Br. 27. *Wilder*, of course, had nothing to do with the CAA. But EPA's analogy is offbase in any event. *Wilder* involved a statute that directed States to determine, and "make[] assurances satisfactory to" the Secretary of Health and Human Services, that certain

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[6] If a State were to establish a blanket rule that BACT is *always* the least expensive technology, such a rule would arguably contravene the statutory requirement that BACT determinations be made on "a case-by-case basis." 42 U.S.C. § 7479(3). No such issue, however, is presented in this case.

rates were "reasonable." 496 U.S. at 501-502 (quotation omitted). The holding in *Wilder* was based in part on the idea that there was an objectively "correct" determination of "reasonable" rates. *Id.* at 513-514. As the Court later observed, "the word 'reasonable' occupied a prominent place in the critical language of the statute" in *Wilder*. *Suter* v. *Artist M.*, 503 U.S. 347, 357 (1992). By contrast, the CAA does not require such an objectively correct determination of BACT, but rather directs a highly discretionary weighing of factors in selecting the "best" available control technology.

The BACT determination is thus much closer to the statutory scheme in *Suter*, *supra*, which the Court held created no enforceable rights, than that in *Wilder*. *Suter* held that a statute did not create an enforceable right under Section 1983 to ensure that States made "reasonable efforts" to keep children in their homes, because the directive was one "whose meaning will obviously vary with the circumstances of each individual case." 503 U.S. at 360. "How the State was to comply with this directive * * * was, within broad limits, left up to the State." *Id.* *See also id.* at 362 (legislative history "indicated that the Act left a great deal of discretion to [the States]"). The CAA directs the States to weigh "energy, environmental, and economic impacts and other costs" in determining BACT, 42 U.S.C. § 7479(3), but similarly provides no detailed, enforceable guidance as to the specific impacts and costs the States should weigh, or how to weigh them.[7]

To the extent *Wilder* has any marginal relevance here, it supports Alaska's position, not EPA's. *Wilder* relied on the fact that the statute at issue required States to "make[] assurances satisfactory to the Secretary" that the rates they

[7] By contrast, *Wilder* "relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates." *Suter*, 503 U.S. at 359 (citing *Wilder*, 496 U.S. at 519 n.17).

found were "reasonable and adequate." *Wilder*, 496 U.S. at 501-502 (citation omitted). The Court held that "there would be no reason to require a State to submit assurances to the Secretary if the statute did not require the State's findings to be reviewable in some manner by the Secretary." *Id.* at 514. That federal enforcement scheme stands in marked contrast to the one at issue here. Here, as with the law in *Suter*, 503 U.S. at 360, the CAA does *not* require the States to submit individual BACT determinations to EPA for approval, except in one specified instance not applicable here.

C. EPA's Position Is Contrary To The Statute's Legislative History And Purpose.

1. Like the Ninth Circuit, EPA steers clear of the CAA's legislative history making plain that Congress intended BACT to be "strictly a State and local decision." S. Rep. No. 95-127, at 31. Instead, EPA cites excerpts stating, for instance, that " '[t]he Administrator thus could go to court to stop a permit * * * which * * * did not comply with the requirements of [the PSD provisions], including the use of [BACT].' " EPA Br. 30-31 (citation omitted). But such statements do nothing to advance EPA's interpretation. As we have already explained (Br. 33-34), the mere fact that Congress intended EPA to enforce "requirements" of the Act says nothing about what those requirements are.

EPA also ignores the history that makes clear that Congress not only intended to allow continued economic growth in clean air areas, but specifically intended the States—"not Federal agencies"—to determine how much growth to allow. *See* Alaska Br. 30-32. As we have explained, BACT is "key" to "manag[ing] * * * allowed internal growth" under the Act. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 364 (D.C. Cir. 1980); S. Rep. No. 95-127, at 31. For this reason, Congress "place[d] [the] responsibility [to determine BACT] *with the State*." *Id.* (emphasis added).

Contrary to EPA's assertion, we do not suggest that "a State may determine BACT simply by dividing up the allowable increments among facilities as it sees fit," or that "compliance with the overall increment limitations * * * establish[es] that the State has satisfied the separate BACT requirement for each facility." EPA Br. 36-37. Rather, we have noted that, in weighing "energy, environmental, and economic impacts and other costs," a State has "broad flexibility" to consider how much economic growth it desires in a particular area and thus how much of the available increment a State wants a particular facility to consume. *See* Alaska Br. 24. EPA does not dispute that States may take the increments into account in determining BACT. Nor could it, as Congress expressly intended the States to consider "the increment of air quality which will be absorbed by any particular major emitting facility." S. Rep. No. 95-127, at 31. *See also id.* ("flexible approach" in determining BACT "allows the States * * * to judge how much of the defined increment * * * will be devoted to any major emitting facility").

2. EPA (and its amici States) contend that the CAA's legislative history shows that Congress intended EPA to have "ultimate authority" over state BACT determinations to protect other States from cross-border pollution. *See* EPA Br. 32-33. Of course, there are no other States anywhere near Alaska. But in any event, Congress provided a detailed remedy for this general problem that does *not* grant EPA veto authority over BACT determinations. Section 126 of the CAA requires sources subject to PSD permits to provide written notice to all nearby States whose pollution levels might be affected. 42 U.S.C. § 7426(a)(1)(A). Upon the petition of any such State, EPA is granted the authority to block construction or operation of the source, but *only* if EPA finds, after a public hearing, that the source would harm the ability of the *neighboring* State to meet the NAAQS, or the PSD measures in its SIP. *See id.* §§ 7426(b), (c)(1),

7410(a)(2)(D)(i).[8] Congress expressly recognized that some States may have "more stringent control requirements" that place plants in those States at a "competitive disadvantage," and it therefore enacted Section 126 as its carefully-crafted solution. S. Rep. No. 95-127, at 42. Once again, Congress's express specification of an EPA enforcement remedy that does not include the authority to veto BACT determinations is further confirmation that such a veto power does not exist.

3. EPA also contends that the legislative history shows that EPA must have veto power over state BACT determinations to prevent States from competing for industry through lax enforcement of environmental laws. *See* EPA Br. 33-34. Of course, such concerns were never an issue here, as the Red Dog Mine is not going anywhere.[9] But any concerns that EPA, other States, or anyone else may have about a permit may be addressed through the public comment and state review process. Some States may face competing applications for consumption of allowable increments, and may therefore choose as BACT only the most stringent controls. Such States may feel disadvantaged compared to cleaner or less-developed States. But Congress intended each State to consider "*anticipated and desired economic growth for the area.*" S. Rep. No. 95-127, at 31 (emphasis

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[8] Section 7426 gives EPA authority to enforce violations of the SIP provisions of Section 7410 relating to cross-border pollution. Although the amended text of Section 7426 refers to Section 7410(a)(2)(D)*(ii)*, it has been held definitively that this was a scrivener's error that in fact refers to Section 7410(a)(2)(D)*(i)*. *See Appalachian Power Co.* v. *EPA*, 249 F.3d 1032 (D.C. Cir. 2001).

[9] EPA's statement that Alaska "provided just under half of the funding" for Cominco's PRI project is misleading. EPA Br. 5. The State owns the port used by the Red Dog Mine as well as the road connecting the two. Although the State issued bonds to fund the expansion and improvement of its facilities in connection with Cominco's PRI project, the State spent no funds on the mine itself. *See* http://www.aidea.org/PDF%20files/DMTSFactSheet.pdf.

added). A State concerned with the impact of increased costs on an economically disadvantaged population in an area experiencing little growth or emissions may lawfully issue a BACT determination reflecting those priorities.

Congress *could* have adopted a national standard for BACT for particular sources. Indeed, Congress took precisely such an approach under the New Source Performance Standards ("NSPS") program, enacted to further the attainment of the NAAQS. There, Congress directed EPA to publish a list of categories of sources and establish "Federal standards of performance [*i.e.*, emissions limitations] for new sources within such category." 42 U.S.C. § 7411(b). Thus, for example, all fossil fuel-fired steam generators built after August 17, 1971 must have controls that prevent NOx emissions in excess of specified levels. *See* 40 C.F.R. § 60.44.

But in the PSD program, Congress "purposely chose not to dictate what State and local decisions on air quality deterioration must be," H.R. Rep. No. 95-294, at 146 (1977), provided those decisions meet the NSPS and other baseline federal standards. In particular, Congress chose not to adopt a "uniform Federal standard" for BACT. S. Rep. No. 95-127, at 31. Rather than ensure "national consistency" for BACT by adopting a "control technology of choice" for particular sources—as EPA asserted below, J.A. 129, 148, 303—Congress left it to the States to "weigh[] * * * environmental and economic goals and needs," and "balance sometimes conflicting goals" H.R. Rep. No. 95-294, at 146, "on a case-by-case basis." 42 U.S.C. § 7479(3).

4. EPA has no answer for the incongruous results that follow from its position. For instance, if a party had challenged the State's decision through the state review process, the challenger would have had to show that the State's decision was arbitrary or capricious. But because EPA vetoed ADEC's decision here by fiat, the State had to show that *EPA's* action was arbitrary or capricious, thereby resulting in

a diluted form of deference to ADEC's decision. EPA's circular response—that such an anomalous result supports its interpretation of the CAA because it "naturally follows" from its interpretation, EPA Br. 39, is no response at all. Nor does EPA have a response for the other procedural anomalies engendered by its interpretation. *See* Alaska Br. 36-37.[10]

EPA's interpretation effectively eliminates Congress's distinction between States exercising authority under approved SIPs and States merely exercising federal power delegated by EPA. *See* Alaska Br. 5-6. For in either case, EPA asserts authority to override the State's determination. In fact, EPA provides *greater* rights to States that are merely exercising delegated federal power. When EPA believes a "delegated" State has made an unreasoned BACT determination, EPA's preferred approach is not to overturn it by fiat, as it did here, but rather to challenge the determination through EPA's own review process. *See* Cert. Rec. 70-004 to -006. EPA's assertion that it can unilaterally veto an *approved* State's BACT determination turns the statutory scheme on its head.

D. *Chevron* Deference Does Not Apply.

As a last resort, EPA argues that its interpretation is owed deference under *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). But no deference is due here, because Congress's intent that the States be the sole arbiters of BACT is manifest from the plain language of the CAA and its legislative history. *See id.* at 842-843 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed in-

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[10] In the Ninth Circuit, Alaska specifically noted that the record in this case might not include all the materials on which the State relied in making its BACT determination, and that additional evidence in support of the State's BACT determination would be produced if EPA were required, like everyone else, to use the *de novo* administrative state review process to challenge the State's decision. *See* Response to Hardesty Decl. at 3 (Aug. 17, 2001).

tent of Congress."). Even if the CAA were ambiguous, however, EPA's interpretation would still deserve no deference.

First, EPA seeks deference for its interpretation as "embodied" in the orders in this case, EPA Br. 41, but those orders *nowhere* state EPA's current position that ADEC failed to provide a "reasoned" BACT determination. Instead, the orders simply assert that ADEC failed to comply with the PSD requirements of the CAA because, as a *factual* matter, "SCR is BACT." Pet. App. 34a, 46a, 59a. Regardless of whether deference can be given to an interpretation "embodied" in a unilateral administrative compliance order, no deference is due here given that the orders do not even embody the particular interpretation for which deference is sought.

Second, this Court has "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or *adjudication* that produces *regulations* or *rulings* for which deference is claimed." *United States* v. *Mead Corporation*, 533 U.S. 218, 229 (2001) (emphasis added). No such delegation is at issue here. While the orders at issue do carry "the force of law" (EPA Br. 41) in that they subject Cominco to severe penalties for their violation, they were not in any sense issued "in the process of * * * *adjudication*." EPA did not conduct any sort of adjudicative proceeding, but simply overturned Alaska's BACT determination by fiat.[11]

Third, although EPA argues for deference because its interpretation is reflected in certain EPA guidance documents, EPA Br. 41-42, "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of

[11] EPA's observation that "formal" adjudication is not required for *Chevron* deference is immaterial, because EPA's orders were not the result of *any* sort of "adjudication." *See* EPA Br. 43 n.16. In a similar vein, EPA's reliance on *Martin* v. *OSHRC*, 499 U.S. 144, 156-157 (1991), is misplaced. That case involved deference to an agency's interpretation of its own regulation.

which lack the force of law[,] do not warrant *Chevron*-style deference." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). The same is true for statements made in a rulemaking that are not reproduced in the rules themselves, EPA Br. 42-43, since such statements, too, "lack the force of law."

Finally, EPA's interpretation is not entitled to any weight under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), where the focus is on "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228 (footnotes omitted). EPA's interpretation is not the product of any formal process. Nor does the straightforward question of statutory interpretation implicate EPA's technical expertise. And EPA's interpretation is contrary to Congress's intent, so it plainly lacks the "power to persuade." *Skidmore*, 323 U.S. at 140. Furthermore, such deference is singularly inappropriate where, as here, the agency's interpretation involves the scope of its own authority. *See, e.g.*, *Northern Illinois Steel Supply Co.* v. *Secretary of Labor*, 294 F.3d 844, 846-847 (7th Cir. 2002). That principle applies with even greater force in this case, where the issue is the allocation of authority between the States and the Federal government—an area where this Court has traditionally required a clear statement by Congress. *See supra* at 5.

II. EVEN IF EPA COULD OVERTURN UNREASONED BACT DETERMINATIONS, IT HAD NO AUTHORITY TO OVERTURN ALASKA'S REASONED DETERMINATION HERE.

Even if EPA were correct that it can unilaterally overturn state BACT determinations that are "unreasoned" or "arbitrary," EPA still had no authority to overturn Alaska's action here, because the State provided a reasoned explanation for its decision.[12] In accordance with EPA's *own* guidance,

[12] This issue is embraced by the question presented, which asks "[w]hether the Ninth Circuit erred in upholding EPA's assertion of

ADEC determined that the cost of SCR for the MG-17 generator was "excessive" because it was well "outside the range of costs being borne by similar sources under recent BACT determinations"—in fact, more than *twice* as much on a cost-per-ton removal basis as the most expensive controls previously imposed by ADEC as BACT to control NOx emissions from a similar type of generator. J.A. 204. *See* Alaska Br. 40, 44-45. ADEC also concluded that the costs of SCR would be "disproportionate" for a rural electric utility and therefore, by analogy, for a mine required to supply its own power. J.A. 206. Thus, even though Cominco had not provided detailed financial information concerning the impact of SCR on its operations, J.A. 207, ADEC could still reasonably conclude that the excessive and disproportionate costs of SCR warranted its rejection as BACT.[13]

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authority to second-guess a permitting decision made by the State of Alaska." Pet. i. EPA asserts authority to overturn only "arbitrary or unreasoned" state BACT determinations. EPA Br. 21. Thus, whether the State issued a reasoned justification is "fairly included" within the question presented, S. Ct. R. 14.1(a), given EPA's view of the limits of its authority. *See* Cert. Reply 9 n.4.

[13] EPA notes that ADEC had concluded in its *preliminary* TAR that SCR was economically feasible. EPA Br. 47. As we have explained (Br. 43 n.13), ADEC did not conduct a cost-effectiveness analysis at that time because it had accepted Cominco's emissions-netting proposal. The final decision prompted ADEC to conduct a more informed weighing of economic impacts. There, ADEC examined "four recent BACT determinations for diesel-electric generators used for primary power production." J.A. 205-206. *See also* Cert. Rec. 22-032 to -033. Although these determinations may not have been as recent as ADEC would have preferred, they were still ADEC's most recent determinations and in the end ADEC chose to rely on them. *See* J.A. 243. Like the Ninth Circuit below, EPA fails to recognize that the type of heater involved in the Yukon-Pacific permit, which imposed NOx controls at $7,000 per ton of NOx removed, is not a "similar source." *See* EPA Br. 48; Pet. App. 14a; Alaska Br. 46; Cert. Rec. 22-033.

EPA claims that ADEC had no "reasoned basis" for rejecting SCR based on "economic impacts and other costs" because SCR's "world-wide pervasiveness" demonstrates its "economic feasibility." EPA Br. 47. Yet EPA has *never* pointed to a single instance where SCR had previously been imposed as BACT to reduce NOx emissions from a similar source—and EPA does not do so now. *See* Cert. Rec. 71-116 (sources "should demonstrate to the satisfaction of the permitting agency that costs of pollutant removal for the control alternative are disproportionately high when compared to the cost of control *for that particular pollutant and source in recent BACT determinations*") (emphasis added).[14]

Moreover, EPA's *own* BACT guidance provides that "[i]n the economic impact analysis, primary consideration should be given to quantifying the cost of control *and not the economic situation of the individual source.*" Cert. Rec. 71-115 (emphasis added). Following that guidance, ADEC determined that SCR was far more costly than technologies that had been found as BACT for similar sources, and would have a "disproportionate" impact on a mine required to act as its own primary power source. J.A. 206. ADEC reasoned that if a rural utility would not be required to incur the costs that SCR would impose on the local community, then a rural facility that must act as its own utility should not be required to bear them either. Given that SCR would not be BACT if a

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[14] EPA contends that a "fair reading" of its guidance is that once a control technology has been " 'effectively employed in the same source category,' " that technology generally should be considered BACT for the source category. EPA Br. 47 n.17 (quoting Cert. Rec. 71-115). Congress, however, plainly did not intend to establish a national BACT standard for particular sources. In any event, EPA's post hoc explanation does it no good here. As just explained, EPA has never been able to cite an example where SCR had previously been imposed as BACT to reduce NOx emissions from "diesel-electric generators used for primary power production"—the source category at issue here. J.A. 205-206.

rural utility supplied power to the Red Dog Mine, *cf. infra* n.15, the outcome should be no different where the power is generated on site. Although EPA may disagree with this explanation, there is nothing arbitrary or unreasoned about it.

Ultimately, EPA's disagreement with ADEC rests on a dispute about policy—which even EPA must admit is not an appropriate ground for it to overturn a state BACT determination. Disregarding its own guidance, EPA insisted during the permitting process that "economic infeasibility" could be justified only by a showing of "adverse economic impacts upon Cominco *specifically*." J.A. 127 (emphasis added). And it now responds that Cominco "is not a rural utility and it does not compete with rural utilities," EPA Br. 48-49, echoing the Ninth Circuit's cavalier rejoinder that "Cominco does not, in fact, buy power from an electric utility." Pet. App. 14a. According to EPA, the economic impact of SCR on a large commercial venture would not be "anything like" its impact on "a rural, non-profit utility that must pass costs on to a small base of individual consumers." EPA Br. 49. EPA's view, therefore, is that BACT is the most stringent control technology a particular source can afford. Indeed, at the same time that EPA was insisting that SCR was BACT for the MG-17 generator, EPA was assuring an Alaska rural electric cooperative association that EPA would not "make the same demands for PSD permits for rural utilities which install similar generators." Cert. Rec. 62-001.[15]

Nothing in the CAA—or even EPA's own guidance—suggests that BACT must be the most stringent control that does not bankrupt a company. Indeed, it is EPA's decision, not ADEC's, that is the arbitrary one. EPA's assurance that it would not "make the same demands for PSD permits for

[15] Thus, EPA raised no objection when ADEC later determined that a technology less stringent than either SCR or Low NOx was BACT for a rural utility 90 miles from the Red Dog Mine. *See* http://www.state.ak.us/dec/dawq/aqm/132ac004fin.pdf.

rural utilities" demonstrates that EPA itself believes that "economic impacts and other costs" *can* include costs that may have to be passed on to the regional community. That is no different from considering the impact of the excessive costs of a control on an undeveloped region's largest and most important private employer and the regional community it benefits. That determination is exactly the kind of case-by-case, discretionary balancing of economic factors that Congress intended to leave to States, which have much greater understanding of local conditions than EPA.

Finally, in judging the reasonableness of ADEC's action, it cannot be ignored that the *result* of the State's approach was *lower* NOx emissions than if ADEC had selected SCR as BACT for the MG-17 generator, because Cominco had agreed to install—and indeed has installed—Low NOx on all its generators. *See FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942) ("If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.").[16] In the final

[16] EPA never disputed this point during the permitting process, in the proceedings below, or at the certiorari stage in this Court. Now—for the first time—EPA contends that ADEC's decision would *not* result in lower emissions. *See* EPA Br. 46. That contention is mistaken. The pre-existing limit for NOx emissions that was retained in the final permit applies *only* to the MG-1, MG-3, MG-4, and MG-5 generators, not MG-2 and MG-6. *See* J.A. 156-157, 214-215. The installation of Low NOx on those two otherwise exempt generators results in emissions savings because, as ADEC reasonably found, a generator equipped with the more costly SCR would remain on stand-by throughout the year. *See* J.A. 86-87. EPA has never challenged the reasonableness of that real-world and site-specific assumption. To protect the applicable increment, the final permit imposes a *new* cap equal to the amount of emissions from seven generators installed with Low NOx in continuous operation. *See* J.A. 86, 155, 230. As a practical matter, however, all seven generators will never be in continuous

analysis, ADEC decided not to rely on emissions savings from the installation of Low NOx on all Cominco's generators after EPA reversed course and objected to that approach. *See* Alaska Br. 42 n.12. Nevertheless, EPA's contention that the CAA does not allow BACT determinations to be justified by emissions savings is simply wrong. EPA Br. 45-46. The Act requires consideration of "environmental" impacts "on a case-by-case basis." 42 U.S.C. § 7479(3). Given that cleaner air is the ultimate goal of the CAA, a BACT decision whose overall "environmental" impact is lower emissions as compared to another technology cannot be deemed so inherently arbitrary or unreasonable as to justify an EPA veto.

Ultimately, ADEC's careful and conscientious weighing of factors in light of local conditions and priorities further demonstrates why the authority to render—and, if necessary, to review—discretionary BACT determinations should be left where Congress expressly put it: with the State.

CONCLUSION

For the foregoing reasons, and those in petitioner's opening brief, the judgment below should be reversed.

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operation. Thus, Cominco's agreement to install Low NOx on MG-2 and MG-6 will still result in lower emissions.

No. 02-658

IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR TECK COMINCO ALASKA INCORPORATED IN SUPPORT OF PETITIONER

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REPLY BRIEF FOR TECK COMINCO ALASKA INCORPORATED IN SUPPORT OF PETITIONER

ARGUMENT

The Alaska Department of Environmental Conservation ("Alaska" or "ADEC") has explained in detail why the governing statute does not provide EPA with unilateral veto power over discretionary BACT determinations that Congress entrusted to the State. As Alaska has shown, the proper remedy for any party concerned about a State's exercise of the discretion afforded by the Clean Air Act is completion of the State's own administrative and judicial review procedures. Such procedures have been, and will continue to be,

fully adequate to address all of EPA's concerns about arbitrary agency action.

Cominco will not repeat those arguments here. Instead, Cominco responds to clarify certain assertions made by EPA and its amici regarding Cominco and its permit. As shown below, ADEC's decision is fully justified in both law and fact. And as evidenced by the reasonable permit proposals made by Cominco and accepted by ADEC, Cominco takes seriously its commitments to preserve the environment in which it operates and to promote balanced economic development in the local region.

Had ADEC's decision gone through the administrative and judicial review procedure afforded by Alaska law, Cominco is confident the decision would have been sustained in full. But since EPA proceeded instead with a unilateral veto authority it does not have, Cominco and ADEC were deprived of the opportunity to create a full factual administrative record, and ADEC's decision was stripped of the substantial deference it would have been owed on judicial review. All this is further reason why the Court should enforce the statute as written and hold that EPA does not have such authority. The EPA's interpretation not only destroys Congress's cooperative federalism scheme, but subjects applicants like Cominco to intolerable uncertainty by continually raising the prospect that EPA might by fiat unilaterally override a State determination even after that determination becomes final under state law. *See* Cominco Br. 5-7.[1]

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[1] Cominco advised the Ninth Circuit that the record tendered by EPA, on which the agency purportedly based its enforcement orders, was inadequate to evaluate the merits of ADEC's underlying decision. *See* Cominco Alaska Incorporated's Response to the Court's August 3, 2001 Order 5-6 (Aug. 17, 2001); *see also* Petitioners' Combined Reply Brief 1-3 (Sept. 5, 2000). Had the matter proceeded through Alaska's *de novo* administrative review process, all parties would have had the opportunity to create a complete factual record. Even on the present incomplete record, however, ADEC's decision is fully supportable.

I. BOTH THE LAW AND THE FACTS SUPPORT ADEC'S DECISION

At bottom, EPA asserts that it has authority to override ADEC's permitting decision because the decision was, in EPA's view, arbitrary and capricious. The statute, however, makes clear that the *State* is entrusted with the discretion to make BACT determinations, and the concerns raised by EPA are fully addressed by the available state administrative and judicial review procedures, which EPA itself requires as a precondition to approving a state CAA implementation plan in the first place. *See* 61 Fed. Reg. 1800, 1882 (1996). But in any event, even if EPA's own view of its authority were correct, its determination that ADEC acted arbitrarily or unreasonably is incorrect and EPA thus lacks veto authority even under its own view of the law.

1. EPA's argument that ADEC acted arbitrarily rests ultimately on a single premise: that ADEC had a legal duty to determine Cominco's ability to pay for SCR and to impose SCR if the technology was economically feasible for the company. EPA Br. 26-27, 49-50; *see also* Environmental Defense Br. 27-28 & n.28. EPA has taken a position that neither the Clean Air Act, its legislative history, nor EPA's own prior guidance on the statute can support. Cominco did not open its books to ADEC – it did not attempt to prove that installing SCR would force it into bankruptcy – both because it was unwilling to divulge its confidential financial affairs and because that information was not in fact a necessary part of the agency's economic analysis.[2] ADEC appropriately

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[2] EPA requested Cominco to provide "an analysis of the specific economic impacts of requiring SCR at the Red Dog Operations with a projection of the cost per unit of production." J.A. 134. Cominco declined to provide that information in part due to "concerns related to confidentiality." *Id.* However, Cominco did

considered the economic impacts of selecting SCR as BACT in accordance with EPA's published guidelines. Under that *correct* analysis of economic impacts, ADEC's selection of Low NOx as BACT was not arbitrary or capricious.

The Clean Air Act requires the state permitting authority that determines BACT to take into account, *inter alia*, "economic impacts and other costs." 42 U.S.C. § 7479(3). Nothing in this language can be read as requiring a state to evaluate the economic impact of a particular control technology upon the individual permittee. Nothing in the Act's legislative history supports any such mandate. In fact, EPA's own guidance document counsels against consideration of "the economic situation of the individual source." Rec. 71-115 (EPA New Source Review Workshop Manual).

Rather, as EPA admitted prior to this case, "[i]n the economic impacts analysis, primary consideration should be given to quantifying the cost of control." *Id.* As stated by EPA's Environmental Appeals Board ("EAB"):

> Cost-effectiveness usually involves two considerations. First, the permit writer must evaluate whether the total cost per ton of control for the pollutant is within the range of costs being borne by similar sources also charged with controlling the pollutant. Second, the permit writer should evaluate the comparative cost-effectiveness of serious control options to determine their incremental cost-effectiveness.

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review for EPA the extent of its then-current debt ($400 million), its losses at the Mine due to a drop in zinc prices (over $150 million), and its prior investment in environmental improvements at the Mine (over $50 million). *Id.* at 134-35. Separately, Cominco told EPA that the cumulative cost of installing and operating SCR over the 40 remaining years in the projected life of the Mine would be "very significant, substantially affecting Cominco's cost of production." Rec. 56-003.

In re Inter-Power of New York, Inc., PSD Appeal Nos. 92-8 & 92-9, 1994 WL 114949, at *4-5 (E.A.B. 1994).

Despite the clarity of EPA's position on the proper economic analysis, EPA chose this permit proceeding for a new approach. Thus, contrary to the guidance in its New Source Review Manual, in late 1999 – after release of both the Preliminary TAR and the draft Final TAR – EPA's regional office in Seattle told ADEC:

> [I]n order to justify economic infeasibility, the Region believes that the economic impact analysis conducted in the draft permit should have gone beyond a review of cost effectiveness to include an analysis of whether requiring Cominco to install and operate the more effective control strategies [*i.e.*, SCR] would have any adverse economic impacts upon Cominco specifically.

Rec. 50-004 – 50-005.

At the same time, EPA told other owners and operators in Alaska that the agency would not "make the same demands for PSD permits for rural utilities which install similar generators," but instead "will continue to be sensitive to affordability of environmental control technologies for future permit applicants." Rec. 62-001 – 62-002. In short, EPA's new economic analysis turns on the size and profitability of the owner/operator. The presumably richer ones, like Cominco, must pay for the most stringent control technologies, regardless of how the costs of those technologies compare to those imposed on comparable sources. The presumably poorer ones, like the Alaska electric utilities, will be permitted to use less stringent and less costly technologies.

Although EPA's current economic impact analysis is unsupported by either the statutory language or history, it is arguably the EPA's prerogative to change its own view of economic factors that it would consider, if it were the decisionmaker, in making a discretionary BACT decision. *But*

cf. Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."). It is quite another thing, however, for the agency to impose its changed views on a state permitting authority that has relied on EPA's longstanding approach and has discharged its duty to select BACT painstakingly and in good faith.

Here, the record makes clear that ADEC undertook the economic analysis outlined in EPA's New Source Review Manual and EAB decisions. The essential inquiry in the economic analysis is how the cost-effectiveness of SCR on MG-17 compares to the cost-effectiveness of SCR or other NOx-reduction controls found as BACT for other similar sources. *See supra* at 4-5. Yet, as ADEC worked on that comparative analysis, EPA insisted that no technology may be rejected as too expensive if it costs less than $10,000 per ton of NOx removed – without reference to how the actual costs compare to costs allowed in other similar circumstances. The arbitrary $10,000 cut-off stemmed not from the statute or its legislative history, not from any EPA regulations, not from any EPA guidance documents, and not from any court decisions. Rather, it was articulated in a January 1999 letter from an EPA staffer. *See* Rec. 21-013 – 21-014, 21-020 (ADEC internal document referencing and relying upon letter); J.A. 126 (September 1999 EPA letter to ADEC continuing to rely upon $10,000 figure); *see also* Rec. 22-035 (ADEC internal memorandum documenting conversation in which author of letter reiterated $10,000 figure).

There is no legal basis for any across-the-board BACT cost-effectiveness cutoff, much less for the arbitrary $10,000 figure. The apparent references for the claimed cutoff were two examples involving different types of sources and a different pollutant, at least one of which was not based on a BACT determination but on an EPA allegation that was later

withdrawn. Rec. 22-035; Petitioners' Supplemental Excerpts of Record 463-64. Moreover, ADEC stated in the Final TAR that it had contacted each of EPA's regional offices to see whether there is a standardized cost that is considered excessive for BACT, but "the Department found that there does not appear to be a uniform cost policy that is used throughout the country." J.A. 206.

Although the figure was unsupportable, it became a primary basis for EPA's challenge to ADEC's cost-effectiveness analysis and, in turn, for EPA's intervention in this case. J.A. 126. EPA's brief to this Court is notable for its failure to mention, much less defend, the $10,000 purported baseline that figured so prominently in EPA's override of ADEC's discretionary BACT determination. These circumstances – a single staffer's imposition on a state permitting agency of an arbitrary cutoff for the key economic test for BACT – underscore the baselessness of EPA's enforcement orders.

2. For the first time in this proceeding, EPA takes issue with ADEC's statement that "because Cominco had agreed to install Low NOx on *all* its generators, ADEC's permit decision was expected to result in *lower* overall NOx emissions than would occur if SCR – the EPA's preferred technology – were installed on only the MG-17 generator." ADEC Br. 13 (quoted in part in EPA Br. 45) (emphasis in original).

It is undeniable that two of Cominco's preexisting engines – MG-2 and MG-6 – were not subject to BACT and, therefore, that Cominco was not required to install any new control technology on those engines. J.A. 156-57. Moreover, ADEC reasonably found that if SCR were required as BACT for the new MG-17 generator, Cominco would be unlikely to use MG-17 except on a standby basis in light of its significantly higher operating costs. As ADEC recognized, "[t]he higher operating cost of SCR . . . provides an economic incentive for Cominco to reduce the operating time

of the SCR unit. Following this reasoning, Cominco may choose one of the two units fitted with SCR as the standby unit in order to reduce operating costs." J.A. 87.[3] Thus, if SCR were required for MG-17, Cominco would operate four generators full-time with Low NOx controls (MG-1, and MG-4 through MG-6), and two generators full-time with a less stringent control (MG-2 and MG-6), with one largely unused standby unit (MG-17). That standby unit would result in little or no emissions reductions, and there would be no reductions at all from the two exempt full-time units. By contrast, if all seven units were equipped with Low NOx, with six operating full-time, overall emissions would unquestionably be reduced because of the reductions realized from the more stringent controls on the MG-2 and MG-6 units.

Ultimately, ADEC did not include the emissions-netting approach in the Final TAR. But that was in direct response to *EPA's* policy change on the appropriateness of using such an analysis. In March 1999, when ADEC first proposed a calculation based on combined NOx emissions, EPA approved of that approach. Six months later, after ADEC released its Preliminary TAR, EPA withdrew its support of that rationale. J.A. 243-44; Petitioners' Excerpts of Record ("PER") 388, 430. EPA's opposition to the concept, however, finds no support in the statute. Thus, in considering the reasonableness of ADEC's action, it is entirely appropriate to recognize that the *result* of that action will be cleaner air, which is the ultimate goal of the statute.

In determining whether a source will increase emissions so as to trigger BACT review, it is well-settled that a particular device is not considered in isolation; rather, emissions may

[3] As of May 1999, when ADEC issued the Preliminary TAR, the agency still was considering BACT for two engines – MG-5 and MG-17. Ultimately, Cominco agreed to an emissions cap for certain generators, which avoided triggering BACT review for MG-5. J.A. 149, 197.

be "bubbled" so as to consider the entire facility's overall impact:

> [T]he PSD provisions express a purpose of ensuring that economic growth occurs in a manner consistent with preservation of clean air. The bubble concept is precisely suited to preserve air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement.

Alabama Power Co. v. Costle, 636 F.2d 323, 402 (D.C. Cir. 1980) (footnote omitted). *See also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (upholding "bubble" concept as applied to other provisions of Clean Air Act).

There is no reason why the same concept cannot apply when reviewing whether a State has acted arbitrarily or capriciously in rendering a discretionary BACT determination. The statute specifically directs a weighing of the "environmental . . . impacts," among other factors, of a particular technology choice. 42 U.S.C. § 7479(3). Thus, when considering the reasonableness of Alaska's technology choice in this case, the Court should reject EPA's invitation to disregard overall environmental benefits that technology will have. Indeed, as next shown, Cominco's permit will have no adverse effect on the surrounding environment no matter how the case is considered.

II. COMINCO'S PERMIT WILL NOT RESULT IN HARM TO THE ENVIRONMENT

The facts do not warrant the subtext in EPA's and its supporters' briefs that the permit granted to the Red Dog Mine will be detrimental to both the environment and the Native Alaskan population. The Mine has led to limited development in an otherwise undeveloped part of the state, but the PSD program expressly contemplates industrial development within clean-air areas of the nation, and it leaves those

"growth management decisions . . . for resolution by the states." *Alabama Power*, 636 F.2d at 364. Here, ADEC made a reasonable accommodation of economic growth in a rural area that will have *no* impact at all on the air quality in surrounding areas.

As noted, ADEC's decision will result in greater emissions reductions than if EPA's preferred solution were employed. But even if one considered only the emissions from the MG-17 generator, the Cominco permit will have no impact at all on the surrounding environment. Using Low NOx controls on MG-17, the total NOx emissions would remain well below the NAAQS threshold for public health and welfare, and also below the PSD increment (which is set at 25% of the NAAQS threshold). *See* 40 C.F.R. § 50.11(b); *id.* § 51.166(c); J.A. 155, 230. In fact, as the former ADEC Commissioner explained to EPA, the increase in emissions from using Low NOx instead of SCR "*is basically undetectable at the facility boundary* – less than 1 microgram per cubic meter. No people would be affected by using SCR instead of low NOx." PER 430 (emphasis added). Thus, any increased emissions will not stray beyond the uninhabited mine.[4]

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[4] EPA errs in describing the Mine as a population center with "[m]any workers . . . housed within its boundaries." EPA Br. 4. There are no permanent residences at or in the vicinity of the Mine; rather, workers spend intervals of time working on-site before returning, by plane, to their homes. *See Communities: Red Dog Mine* (Nov. 15, 2002) (available at: http://www.beringsea.com/communities/index.php?community=312). While on-site, and particularly in the frigid conditions that exist much of the year, employees spend as much time as possible indoors. *See* Richard W. Phelps, *Leader of the Pack – Red Dog Mine "Grows Up,"* Eng'g & Mining J. (May 1998) (available at: http:/e-mj.com/ar/mining_leader_packred_dog/). Nor is there any community, large or small, "nearby" the Mine. EPA Br. 4. Kivalina (population 377) and Noatak (population 428) are, respectively, approximately 50 miles and 35 miles away. U.S. Census Bureau, *U.S. Census 2000: Alaska: 2000* ("*U.S. Census*") 13, 15 (June 2003); Rec. 17-125; *Alaskan Communities: Northwest Arctic Census Region* (available at: www.ilovealaska.com/alaska/boroughs.cfm?bid=28). The Mine is located 90 miles north of Kotzebue (population 3,082), the next closest town, and 100 miles north of the Arctic Circle. *U.S. Census* at 14; Rec. 17-067. Denali National Park, located 420 miles southeast, is the nearest Class I attainment area – the most protected "clean air" area under the Clean Air Act. Rec. 17-009. In short, contrary to EPA's suggestion, the Mine is in an extremely remote and sparsely populated location. *See also* ADEC Br. 7-9.

Similarly, there is no factual basis for the contention of several amici that the projected increase in NOx emissions could harm nitrogen-sensitive vegetation in the Noatak National Preserve. Kivalina Br. 4; Environmental Defense Br. 20 n.22. ADEC has reviewed two years of on-site vegetation studies and five years of off-site vegetation studies at a comparable site, both of which showed no detectable impact on the tundra vegetation. PER 430.[5]

Finally, ADEC properly took account of Cominco's special role as one of the few sources of economic activity for a disadvantaged community in a remote and inhospitable locale. The agreement between Cominco and the NANA Regional Corporation, Inc. ("NANA") for development and operation of the Mine is unique in both its commitment to the local Native Alaskan population and the control vested in NANA

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[5] One of EPA's amici raises unrelated environmental compliance issues. Kivalina Br. 3-5. Dust pollution from the haul road between the port and Mine, and allegations of impacts of Mine operations on downstream waters, have nothing to do with ADEC's authority to determine Low NOx controls as BACT for the MG-17 generator. Thus, it is not surprising that EPA has not relied on any of these allegations and concerns – all of which have been or are being cooperatively addressed by EPA and ADEC through voluntary actions, agreements, revised permits, and studies – as the basis for EPA's intervention in ADEC's permitting decision.

to ensure that local social and environmental needs are met. The 1982 agreement between Cominco and NANA provides for payment of a substantial annual royalty to NANA, protection of Native Alaskan subsistence resources, training, hiring, contract and purchasing preferences for NANA members, and NANA approval of changes in the Mine's size. *See* Teck Cominco Alaska Incorporated, *A Unique Partnership at the Red Dog Mine: A Model of Cooperation* (available at: http://www.teckcominco.com/presentations/dh-rd-partner-may02.pdf). Red Dog is a model of sustainable development due to its approximately 40 years of reserves and Cominco's commitment to NANA for the life of the Mine. *See* NANA & Cominco, Ltd., *Shared Values, Common Goals, Exceptional Results: The Red Dog Mine Story* 7, 9 (available at: http://www.teckcominco.com/articles/operations/rd-shared values.pdf).

It true that economic and environmental impacts "must always be weighed" against each other in the BACT analysis. Kivalina Br. 5. But that is precisely what ADEC did in this case, after considering the comments of all interested parties. The question is whether that weighing is to be done by the approved State agency that is necessarily closest to the facts and circumstances, or a federal agency operating from offices thousands of miles away. Congress provided a clear answer.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

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BRIEF FOR NANA REGIONAL CORPORATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR NANA REGIONAL CORPORATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

NANA Regional Corporation, Inc. (NANA) is an Alaska corporation formed pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601, *et seq.*, and the laws of the State of Alaska to "promote the economic, social and personal well being" of the Natives of the northwest region of Alaska.[1] NANA owns the land and mineral re-

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of the brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

sources underlying the Red Dog Mine (Mine), and leases the Mine property to Teck Cominco Alaska Incorporated (Teck Cominco) under a long-term mining agreement. The actions taken by the United States Environmental Protection Agency (EPA) threaten the further development of the Mine, potentially depriving NANA shareholders of jobs and reducing NANA's earnings. NANA filed an amicus brief supporting the position of the Alaska Department of Environmental Conservation (ADEC) and Teck Cominco in proceedings before the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

While NANA does not argue the merits in this brief, it does agree with the ADEC and Teck Cominco that the EPA does not have authority under §§ 113(a)(5) or 167 of the Clean Air Act (CAA) 42 U.S.C. §§ 7413(a)(5) and 7477, to unilaterally override a BACT decision by a State which, as here, was made following an EPA-approved State Implementation Plan applying the factors set out in § 169(3) of the CAA, 42 U.S.C. § 7479(3).

Further, NANA supports the terms of the Prevention of Significant Deterioration (PSD) permit issued by the State of Alaska on December 10, 1999, to Teck Cominco. Specifically, NANA supports ADEC's decision regarding the Best Available Control Technology (BACT) provisions included in that permit along with Teck Cominco's voluntary agreement to install low Nitrogen Oxide (NOx) technology on six of Teck Cominco's generators.

ARGUMENT

The Alaska Native Claims Settlement Act of December 18, 1971, PL 92-203, 85 Stat. 688, codified at 43 U.S.C. §1603, called for the establishment of thirteen Regional Corporations, representing the different Native groups throughout Alaska to "promote the economic, social and personal well being of their shareholders. It also created over 200 village

corporations. NANA was the Regional Corporation formed for the Native people of the northwest region of Alaska.[2]

Congress required the Regional Corporations to be incorporated as for-profit corporations, and anticipated that they would become the primary vehicles for the economic development of their region of the State. 43 U.S.C. § 1606. In particular, the subsurface, or mineral lands, were viewed by Congress as a key component of the economic portion of the settlement. The Senate Interior Committee Report notes that an essential aspect of the settlement is a grant of land for use "as a resource base for Native commercial enterprises." S. Rep. 92-403, p. 79 (October 21, 1971). The House Resources Report 92-523 echoes this sentiment:

> The proposed bill, through a combination of providing land and money for the settlement for the Native claims, will provide ... land that is necessary for the living and subsistence of those Natives who continue to rely on the land for their living, *while at the same time providing an economic settlement both in terms of cash contributions and patents to land and mineral rights ... which will be used by the Natives for promoting their economic development to the fullest extent possible.*

Rogers C. B. Morton, Secretary of the Interior's comments to the Speaker of the House. H. R. Rep. 92-523 (Sept. 28, 1971) (emphasis added). As the language of the Act and the legislative history shows, self-determination of Natives through economic independence was an important goal of ANCSA.

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[2] There originally were eleven village corporations in the NANA Region. In the late 1970's, NANA merged with ten of those village corporations.

NANA holds extensive land and mineral resources, including the land and mineral resources underlying the Red Dog Mine (Mine).[3] It leases the Mine property to Teck Cominco under a long-term mining agreement the parties entered into in 1989 (the "Agreement").

Under the Agreement, Teck Cominco developed and now operates the Mine and pays NANA a royalty for the metals mined. The Mine is the only major source of non-governmental jobs in the NANA region. It is the centerpiece of NANA's effort to provide meaningful jobs to its shareholders. On average, 60% of the Mine's workforce consists of NANA shareholders or their spouses. In addition, NANA subsidiaries provide many services to Teck Cominco at the Mine. NANA Management Services LLC provides food service, housekeeping and maintenance. NANA-VECO joint venture performs construction projects. NANA Dynatec Drilling LLC, has done most, if not all, of the exploratory drilling for the Mine. NANA/Lynden LLC transports barge supplies to the Mine from the Mine's port site and hauls the zinc and lead concentrates from the Mine to the port. A substantial portion of the employees of these NANA subsidiaries also are NANA shareholders.

In addition to the benefit these jobs provide to individual shareholders, the wages paid to NANA shareholders have a substantial import on the overall economy of the Region. As stated on pages 46 and 47 of the December 10, 1999, Final Technical Analysis Report by ADEC, J.A. 207, Red Dog

[3] Unless otherwise indicated, the facts in this brief are supported by the January 31, 2003, Affidavit of Marie N. Greene, President of NANA, filed with the Federal District Court of Alaska in Case No. A02-231 Civil (JWS) *Kivalina Relocation Planning Committee v. Teck Cominco Alaska Incorporated*, and the June 28, 2000, Letter of Support signed by NANA Vice President and General Counsel, Jacquelyn R. Luke, filed with the United States Court of Appeals for the Ninth Circuit in Support of NANA's Amicus Brief in this matter.

Mine has greatly boosted the local economy. The Mine's annual payroll of $26.4 million represents over a quarter of the local Borough's total wages and salaries. NANA also receives substantial royalty income and income from its contracts with Teck Cominco. Teck Cominco also contributes substantially to the economy of the Region through its payments in lieu of taxes to the Northwest Arctic Borough.

In the absence of the Mine, the economic opportunities in the Region would be considerably less. Non-Red Dog related jobs in the villages in the NANA region are very limited and are usually related to government-funded positions such as the post office, school district and health service.

Although jobs and economic opportunity are very important to NANA, the land and its resources remain uppermost in the minds of the corporation and its shareholders. Most shareholders living in the Region still rely on a subsistence way of life that requires hunting and gathering from the bounty of the land. Thus, preservation of the land and its environment are first priorities for NANA.

Indeed, the Agreement between NANA and Teck Cominco reflects that one of NANA's core concerns is protection of the subsistence resources. The Agreement establishes a Subsistence Committee (Committee), which advises NANA and Teck Cominco management on the interaction between Mine operations and subsistence resources. The Committee authorizes and reviews a yearly caribou study. When caribou are in the vicinity of the haul road running between the Mine and the port, the Committee shuts down portions of the road. In fact, NANA has the power under the Agreement to direct Teck Cominco to shut down some or all of the Mine's operations if they threaten subsistence.

When mining operations conclude and Teck Cominco's leasehold terminates, the Mine property will revert to NANA. NANA has a fundamental interest in ensuring that the land and waters in the vicinity of the Mine do not pose a threat to

subsistence resources. Again, while Teck Cominco operates the Mine, NANA monitors and has the power to regulate the mining operation to prevent adverse impacts to the value and utility of NANA's real property.

In short, NANA did not move forward with the Mine until it was convinced that the development could occur without adversely impacting the environment. During the operation of the Mine, NANA holds and exercises the power to prevent adverse environmental impacts.

NANA objects to the EPA's issuance of the enforcement orders in dispute here enjoining ADEC and Teck Cominco from installing and operating the generator in question. NANA's opposition rests first on its concurrence with ADEC and Teck Cominco that the EPA does not have the authority under §§ 113(a)(5) or 167 of the Clean Air Act, 42 U.S.C. §§ 7413(a)(5)(A) and 7477, to unilaterally issue orders overriding a State's BACT decision that, as here, was made following an EPA-approved State Implementation Plan applying the BACT factors set out in § 169(3) of the Act, 42 U.S.C. § 7479(3).

NANA's support rests, second, on its comfort with the terms of the PSD permit issued by the State on December 10, 1999, to Teck Cominco, which include the BACT provisions included in tha permit and Teck Cominco's agreement to voluntarily install low NOx technology on all of its primary generators.

NANA, accordingly disagrees with the Ninth Circuit Court of Appeals' decision in *Alaska Department of Environmental Conservation v. United States Environmental Protection Agency*, 298 F.2d 814 (C.A.9 2002), and urges its reversal.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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All parties consent to the filing of this brief.[1]

[1] No party or its counsel authored this brief in whole or in part nor made a monetary contribution to *amici* for the preparation or submission of it.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae are trade associations that represent a significant cross-section of industry whose members apply for and receive many air pollution control permits each year – including Prevention of Significant Deterioration (PSD) and other New Source Review (NSR) permits. For this reason, *amici curiae* are uniquely qualified to offer insights to the Court on this complicated program.

Amicus curiae the National Environmental Development Association's Clean Air Regulatory Project (NEDA/CARP) is a coalition of manufacturing companies that represent major industrial sectors, including primary and secondary aluminum, aerospace, automobile manufacturing, natural resource exploration, refining and petrochemicals, pharmaceuticals, electronics, and home products. NEDA/CARP was formed in 1979, shortly after enactment of the 1977 Clean Air Act Amendments that codified PSD permitting requirements, to address Clean Air Act regulations and Environmental Protection Agency (EPA) guidance that affects the contents of PSD, NSR and later, operating permits, including requirements for construction of new sources like "best available control technology" (BACT). NEDA/CARP's members own and operate facilities that are major sources under the Clean Air Act, and thus they must obtain NSR permits when they build new major sources or seek to construct major modifications at existing major sources.

Amicus curiae the Corporate Environmental Enforcement Council (CEEC) is an organization of corporate counsel and environmental management representing over 30 major companies from a wide range of industrial sectors, including metals, chemicals, pharmaceuticals, paper, oil refining and natural resource exploration, aerospace, defense electronics and shipbuilding, mining, food and home products. CEEC focuses exclusively on civil and criminal environmental

enforcement and enforcement policy issues by providing a forum for review and discussion of such issues and developing constructive recommendations to executive and legislative environmental enforcement policymakers. As an amicus curiae in other cases, CEEC has presented its perspective on the legal and policy implications of EPA actions that substitute its enforcement judgments for the judgments of states with federally delegated enforcement and permitting authority. In addition, CEEC's members also own and operate major sources regulated by the Clean Air Act's NSR program, and spend substantial resources in researching, preparing and negotiating BACT determinations for NSR permits.

Amicus curiae the American Petroleum Institute (API) is a national trade association with approximately 400 members involved in all aspects of the oil and natural gas industry. API members own and operate numerous facilities in many states, including Alaska, that are subject to permitting actions similar to the one at issue in this case.

Amicus curiae the American Chemistry Council (the "Council") is a nonprofit trade association whose member companies represent more than 90 percent of the productive capacity for basic industrial chemicals within the United States. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The Council's 190 members represent 90% of the world's production of basic industrial chemicals. They spend more than $12 billion each year on projects designed to protect human health, safety and the environment.

Amicus curiae the American Forest & Paper Association (AF&PA) is the national trade association representing the

forest products industry. AF&PA has more than 120 member companies that grow, harvest, and process wood and wood fiber and manufacture a wide variety of products including pulp, paper, paperboard and wood products. AF&PA's member companies produce more than 92% of the nation's pulp, 78% of the nation's paper, 89% of the nation's paperboard, 60% of the nation's dimensional lumber, and 85% of the nation's wood panel products. These member companies operate hundreds of manufacturing facilities covered by Clean Air Act permits and other requirements. They must, therefore, make numerous BACT determinations similar to the ones at issue in this proceeding.

SUMMARY OF ARGUMENT

Industry invests substantial resources to modify its facilities and install pollution control equipment to protect human health and the environment. The governmental permitting decisions must be certain and final. The United States Court of Appeals for the Ninth Circuit has undermined these two critical objectives by its holding in *Alaska v. EPA*, 298 F.3d 814 (9th Cir. 2002). Permitting EPA to effectively nullify state permitting decisions months or even years after they are made will hinder or halt major capital projects designed to benefit the economy and the environment. This Court should conclude that Congress understood the need for certainty and finality in the permitting process to allow industry to make the significant capital investments to comply with permitting programs and should protect the integrity of state permitting decisions and the cooperative federalism embodied in the relevant provisions of the Clean Air Act.

ARGUMENT

I. CERTAINTY IS A CRITICAL COMPONENT OF THE NSR PERMITTING PROCESS.

A. The NSR Permitting Process is Complex, Time-consuming and Costly.

The New Source Review (NSR) program requires sources that emit certain pollutants to obtain air pollution permits prior to commencing construction of major new facilities or significant modifications of existing facilities. In areas where the air quality already meets the national ambient air quality standards (NAAQS) (*i.e.*, attainment areas), an applicant triggers the NSR Prevention of Significant Deterioration (PSD) requirements, including a commitment to use the "best available control technology" (BACT) on the unit it is constructing or modifying. In areas where the air quality exceeds a NAAQS (*i.e.*, nonattainment areas), an applicant triggers the NSR nonattainment requirements including application of the Lowest Achievable Emission Rate (LAER). The BACT or LAER determination is often the most critical determination that is made at the time an NSR permit is issued by a state permitting authority (or by the EPA region if the state does not have an approved NSR permit program as part of its State Implementation Plan (SIP)).

The process used to determine BACT for a new or modified emission unit is a complex one. For example, in October 1990, EPA released a draft New Source Review Workshop Manual, Cert. Rec. 71-001 to 71-343, which inter alia, contains 75 pages of guidance on conducting a BACT analysis. There is no "correct" answer in the BACT determination process. Instead, the BACT analysis is done on a "case-by-case" basis, and involves a weighing of a

number of factors including energy, environmental and economic impacts and other costs. 42 U.S.C. § 7479(3). The "top-down" method recommended (but not required) by EPA in the Draft New Source Review Workshop Manual for determining BACT ranks available control technologies in order of control effectiveness. The method consists of five detailed analyses: identification of available control technologies, elimination of technically infeasible options, ranking of control technologies by control effectiveness, evaluation of most effective controls and documentation of results and the selection of BACT. Cert. Rec. 71-089 to 71-093.

In its Draft NSR Workshop Manual, EPA repeatedly recognizes that numerous subjective judgments must be made in each and every step of the BACT analysis. Indeed, the Draft New Source Review Workshop Manual is replete with references to the exercise of "judgment" by the applicant and the reviewing authority.[2]

In conducting a BACT analysis, complex technical issues relating to the appropriate emission factors for different controls, accurate cost estimates of different controls (both

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[2] *See, e.g.*, Draft New Source Review Manual at B.13, Cert. Rec. 71-097 (However, there may be instances where, in the permit authority's judgment, the consideration of alternative production processes is warranted and appropriate for consideration in the BACT analysis), B.19, Cert. Rec. 71-103 ("Technical judgment on the part of the applicant and the review authority is to be exercised in determining whether a control alternative is applicable to the source type under consideration), B.20, Cert. Rec. 71-104 ("Consequently, judgment should be used in deciding what alternatives will be evaluated in detail in the impacts analysis (Step 4) of the top-down procedure discussed in a later section"), B.24, Cert. Rec. 71-108 ("Consequently, in assessing the capability of the control alternative, latitude exists to consider any special circumstances pertinent to the specific source under review, or regarding the prior application of the control alternative").

installation and annual operation), and the practicality of certain control strategies can arise at every turn. Reasonable minds can disagree on these issues at every stage of the BACT analysis; as a result, the final BACT determination is often the result of the exchange of research, discussion, negotiation and cooperation between the permit applicant and the state permitting authority.

The NSR permitting process conducted by the state, including the BACT analysis, can take more than two years. Many SIPs provide for a 30-day completeness review, a 60-day technical review, a 30-day comment period and a 30-day period for a public hearing. In some instances, the 30-day completeness review re-starts if deficiencies must be addressed. In its Report to the President on New Source Review, EPA reported that permitting typically takes from 7 to 22 months. EPA, *New Source Review: Report to the President* at 31 (2002). In fact, the State of Alaska spent 18 months reviewing and analyzing the NSR permit application in this case.

Indeed, the entire process of making modifications to an existing source is a lengthy one. For example, the following chart sets forth the timeframe associated with a significant modification to a major refinery; the total time is five to seven years, including 1.5 years for basic process design and 1.5 to 2 years for the permitting process.

Action	General Time Range
Scoping/screening studies	1.5 years
Basic process design	1.5 years (0.5 overlap with with scoping studies)
Permitting	1.5 to 2 years (0.75 overlap with process design phase)
Detailed engineering	1.25 to 1.5 years (0.75 to 1 overlap with permitting and design phase)
Construction	1.5 to 2 years (0.5 overlap with detailed engineering phase)
Startup-up/shakedown	0.5 to 1 year

Total of 5 to 7 years

Even in the best of circumstances, the refinery modification process takes five to seven years. Obtaining a major NSR air permit, which is an integral part of the modification process, can take two or more years, particularly if pre-construction modeling is needed to assure the attainment status of the area. While this example is from the oil and natural gas industry, securing a major NSR air permit is a complex and lengthy process for any facility, regardless of industry sector.

B. Permit Applicants Make Significant Financial and Manpower Investments in the Development of BACT Determinations.

The process of obtaining an NSR permit is a costly one as well. The entire air permitting process can cost as much as $500,000. In particular, the analysis of BACT frequently requires the retention of independent environmental and engineering professionals, and entails lengthy periods of

discussion and often negotiations with state permitting authorities before a BACT determination is formally made by the state permitting authority. Often the engineering and design move forward hand in hand with informal discussions with state permitting authorities and may not be finished until the question of BACT is resolved.

The BACT process involves frequent communication and correspondence and extensive negotiations between the permit applicant and the state permitting authority, often resulting in concessions by the permit applicant. When the state permitting authority has made its preliminary BACT determination, the typical SIP provides for a public comment period for the proposed permit. *See, e.g.*, Alaska Admin. Code § 50.315. At the conclusion of the public comment period and upon issuance of the permit, most SIPs also contain a provision authorizing persons to request a hearing on the permit as issued, and to seek judicial review of a final permitting agency's decision. *Id.* Thus, the process involves a significant investment by the applicant in time, money and manpower to work through the NRS permitting process.

C. The Significant Investment by Permit Applicants in the Negotiation Process is Premised on the Authority of the State Permitting Authority and the Finality of its Determination.

As set forth above, permit applicants invest significant time and resources in the BACT determination process. Accordingly, as even EPA recognizes, [3] applicants need reasonable certainty in the BACT determination process.

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[3] For example, in its 1990 Draft New Source Review Workshop Manual, EPA "encourages" applicants to discuss the judgments they are making as to which alternatives will be evaluated with the reviewing authority in the pre-application meeting. Draft New Source Review Workshop Manual at B.21, Cert. Rec. 71-105.

However, there is little incentive to participate in meaningful discussions with a state permitting authority and to make meaningful concessions if EPA can choose not to participate in the state permitting process yet exercise post-permit issuance ultimate veto authority over the state permitting decision. With a potential EPA veto hanging over permit applicants' heads for years as well as potential substantial Clean Air Act penalties,[4] applicants will have little incentive to work with the states or to make significant concessions. The erosion of the state permitting authorities' ability to work with applicants in approving BACT determinations will make it increasingly difficult for states to run efficient and environmentally protective air permitting programs.

If EPA can simply ignore a state permitting authority's NSR permitting decision made in accordance with procedures adopted by the state and incorporated into the EPA-approved SIP, and issue an enforcement order to overturn that decision, regulated entities will be forced to request that EPA "pre-approve" any and all NSR permits to eliminate that possibility. This not only undermines the responsibility and credibility of the state permitting authority, it also encroaches on federalism and the federal-state relationship in SIP-approved states. Finally, given its finite resources, EPA is not likely to be in a position to consider meaningfully all such requests, and certainly not in a timely fashion.

At the same time, states will find it more and more difficult to negotiate BACT determinations because they will not be

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According to EPA, "In this way, the applicant can be better assured that the analysis to be conducted will meet BACT requirements." Id.

[4] The Clean Air Act provides for penalties of up to $27,500 per day for each violation as well as other noncompliance and criminal penalties. 42 U.S.C. §§ 7413(c) and (e), 7420.

able to provide the needed certainty to permit applicants. As a result, industry will find its ability to make investments and modify its facilities in response to changing market conditions severely hampered. The bottom line is that permit applicants will be reluctant to invest time and money in working with the state permitting authority in the absence of certainty with respect to the final air permit.

D. Finality is Critical to Permit Applicants Because of the Significant Capital Investment in BACT.

If regulated entities cannot be certain whether a permit decision is truly final, they will be unable to rely on their dealings with state officials. This in turn will have a chilling effect on capital projects and interfere with the ability of the regulated community to plan and make investments in their facilities.

The pollution control technology representing BACT can result in the expenditure of millions of dollars in both capital costs and operational and maintenance costs. For example, the capital investment in BACT for a large industrial boiler can run between $1 million and $20 million. If there is uncertainty as to the appropriate (and lawful) BACT control strategy, the potential additional costs associated with that uncertainty could cause an owner or operator to decide against making that capital investment.

By way of example, if EPA were to issue an enforcement order requiring additional controls after a permittee had ordered or installed control equipment required by the state-issued permit, the additional costs to be incurred by the permittee are compounded because change orders are extremely expensive. For instance, for some equipment, ultra Low-NOx combustors are frequently approved as BACT. However, if EPA later announced its belief that Selective Non-Catalytic Reduction (SNCR) (an expensive and

controversial control that raises other issues) was BACT for a particular project, depending on design and size, the additional cost of the new equipment alone could add 65% to 100% to the NOx control cost or 15% to 30% to the total project cost for installation of an industrial boiler. If SNCR controls must be added after equipment construction has begun, or after the installation is complete, the total project cost could be further increased by 15% to 30% or more.

For projects near the economic viability threshold, these added costs might destroy the economics of the expansion or modernization project. Meaningful facility upgrades and environmentally beneficial improvements could be scrapped if the projects would not be economical in light of the risk of increased costs due to late EPA veto of the BACT determination - even though such costs might never actually materialize.

Industry simply cannot proceed with major capital projects if there is no finality to permitting decisions and capital costs cannot be determined with the necessary accuracy. Indeed, if state permitting decisions are overturned by EPA years after the equipment has been installed, the costs to the source - - in new equipment and/or penalties or fines - - would be staggering. This lack of finality in the air permitting process would significantly deter or even halt investments in facility improvements that provide increased productivity, efficiency and environmental benefits.

The economic harm to an owner or operator due to a "late hit" from EPA must also be measured in lost productivity and profits. If the owner or operator receives an enforcement order from EPA that stops it from completing construction of a production unit, or the operation of a completed production unit, the cost to the owner or operator in terms of lost productivity could be crippling. For example, a typical 1000 ton per day pulp and paper mill receives a revenue stream of approximately $600 to $900 per ton or $600,000 to $900,000 per day. If forced to shut down a unit in operation, the lost

revenue to such a mill could approach $1 million per day. Similarly, to close or delay a new pharmaceutical production process could mean lost revenues of $1 million per day. In such circumstances, the shutdown may extend for months or years.

Thus, applicants will be left in limbo if EPA regional offices can choose to retain post hoc veto authority through their enforcement powers months or even years later. Moreover, the mere uncertainty as to whether EPA will step in later to override the state permitting authority's decision will hinder significant capital projects and impede economic growth. Accordingly, this Court should not permit EPA to upset industry's settled and reasonable expectations with respect to the BACT determination process by subjecting industry to a regulatory environment fraught with enforcement uncertainty.

II. STATE IMPLEMENTATION PLANS PROVIDE PROCEDURES FOR EPA TO PARTICIPATE IN THE PERMITTING PROCESS, AND THOSE PROCEDURES CONTAIN ADEQUATE SAFEGUARDS FOR EPA.

A. State Implementation Plans, Which are Approved by EPA, Provide Adequate Safeguards to Ensure EPA Input into Permitting Decisions.

The permitting procedures built into SIPs, including those that provide for a public comment process, provide ample opportunity for EPA to participate in the permitting process. *See, e.g.*, Alaska Admin. Code § 50.315; 42 U.S.C. §7545(a)(2). Thus, EPA has a built-in mechanism to use if it believes that a state's conclusions regarding BACT are incorrect. The state permitting agency must consider all

comments made, including those made by EPA challenging a BACT determination, in issuing a final NSR permit. Alaska Admin. Code § 50.315. As a practical matter state permitting authorities give significant weight to timely comments provided by EPA.

Industry does not object to EPA weighing in on state permitting decisions, but such participation should take place in a timely fashion and within the confines of the permitting process as set forth in the EPA-approved SIP. What is critical to industry is that at the end of the lengthy and costly state permitting process, the source has a permit in hand that defines its obligations once and for all. Once a permit is issued by the state, the source must be able to rely upon it. With clear and final direction from the state permitting authority, the source can proceed with its project free of the uncertainty that is present if EPA retains the authority to issue a post hoc enforcement order vetoing the state permitting decision.

B. EPA Should Be Required to Utilize Available Administrative Review Processes, Including Judicial Review of a State Permitting Decision, Rather than Issuing Unilateral Post Hoc Enforcement Orders

In circumstances where EPA disagrees with a state's BACT determination, that disagreement is properly viewed as a program administration dispute between the two sovereigns. In that instance, the CAA and the EPA-approved SIP provide a mechanism for resolution of that dispute – EPA may participate in the public comment process and, where its comments are not addressed to its satisfaction, further challenge the state's decision through the state administrative and judicial appeal process, applying the applicable rules contained in the SIP. In the case at bar, the Alaska administrative process provides the opportunity for

EPA to participate in the public comment process, to request an adjudicatory hearing on the permit decision, and ultimately to seek judicial review of Petitioner's permit decision. Alaska Admin. Code § 50.315; Alaska Stat. § 46.14.200.

Both the Court of Appeals for the Seventh Circuit and the District Court for the Western District of Wisconsin have addressed the issue of whether EPA can mount a collateral attack on a state permit decision by bringing an enforcement action against the party that was issued the Clean Air Act permit and was in compliance with that permit, where the EPA did not appeal the issuance of the permit. In *U.S. v. AM General Corp.*, 34 F.3d 472 (7th Cir. 1994), the Seventh Circuit dismissed an enforcement action brought by EPA, pursuant to Section 113(a)(5) and 113(b)(3),[5] on the grounds that EPA did not appeal issuance of the permit pursuant to the applicable provisions of the applicable county and state review procedures, including obtaining review in state court. *AM General*, 34 F.3d at 474-475. In *U.S. v. Murphy Oil USA, Inc.*, 143 F.Supp.2d 1054 (W.D. Wis. 2001), the District Court cited to the Seventh Circuit's opinion in *AM General* and held that where a valid permit was issued by the state agency, EPA could not seek review of the validly issued permit in the context of an enforcement action – it must challenge the issuance of the permit pursuant to the applicable state provisions regarding challenges to state permitting decisions. Applying the logic of these cases, EPA should have expressed its views in the state permitting process and pursued its disagreement with Petitioner's BACT determination through a challenge to the permit issued by the Petitioner, pursuant to the procedures set forth in the Alaska statutes and code cited above.

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[5] The Seventh Circuit noted that the statutory sections cited by EPA in *AM General Corp.* were amended in 1990, but that the amendments did not seem pertinent to the issue decided by that court.

It is patently unfair (especially in light of the staggering costs outlined above) to use the regulated entity as a pawn in the resolution of a dispute among sovereigns, as occurred in the instant case. It is particularly egregious for EPA to do so by issuing an enforcement order to the permit applicant that had followed all applicable procedural and substantive permitting requirements, when EPA failed to follow the administrative process that EPA itself approved as part of the Alaska SIP. Finally, the course of action chosen by EPA also threatens to completely undermine the credibility of state permitting processes and the administrative processes established by states to provide for review of permitting decisions. *See* Brief of Amici Curiae States of North Dakota, Wyoming, Alabama, Delaware, Iowa, Montana, Nebraska, Nevada, South Dakota and Utah in Support of Petitioner's Petition For Writ Of Certiorari, pp. 11-12.

CONCLUSION

For the forgoing reasons, the judgment below should be reversed.

Respectfully submitted,

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STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF NORTH DAKOTA, WYOMING, ALABAMA, DELAWARE, IOWA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH, AND VIRGINIA IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE*

The States of North Dakota, Wyoming, Alabama, Delaware, Iowa, Nebraska, Nevada, Oklahoma, South Dakota, Utah, and Virginia, as *amici curiae* ("*Amici* States"), respectfully submit this brief in support of Petitioner the State of Alaska. *Amici* States oppose the decision below of the United States Court of Appeals for the Ninth Circuit, which skews the federal-state partnership envisioned by Congress under the Clean Air Act (the "Act"), 42 U.S.C. §§ 7401-7671q, in general and, in particular, under the Act's Prevention of Significant Deterioration ("PSD") provisions, *id.*, §§ 7470-79. *Amici* States urge this Court to reverse in order to correct the imbalance wrought by the Ninth Circuit's decision.

STATEMENT OF INTEREST

Protection of public health and the environment is of manifest importance to all States. Air pollution affects health and quality of life, and it has obvious impacts on the environment. As a result, *Amici* States fully support the goals and policies that underlie and are embodied in the Act. At the same time, *Amici* States share an interest in ensuring that the Act is construed in a way that protects the social and economic well-being of their citizens, as well as their public health and welfare. *Amici* States also have a compelling interest in protecting their congressionally-mandated authority under the Act, in ensuring sound PSD permitting decisions, in avoiding confusion concerning the scope of state-versus-federal authority, and in promoting the orderly function of their administrative decision-making processes under the PSD program.

Because the analysis and conclusion of the Ninth Circuit decision are contrary to each of these interests, *Amici* States support reversal of the judgment below.

SUMMARY OF ARGUMENT

The Clean Air Act recognizes and respects the tension that can arise between environmental protection and social and economic impacts on a community. Congress expressly reserved to the States the role of balancing those competing concerns under the Act's PSD provisions, which apply in "clean air" areas of the country. The Act requires new sources of pollutant emissions to use Best Available Control Technology ("BACT") in areas where air quality is already better than the National Ambient Air Quality Standards (the "NAAQS"). In the statutory definition of BACT, Congress provided that the States must decide what constitutes BACT for a particular source, based on a consideration of "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3).

Nowhere in the language or the structure of the Act, or in its legislative history, did Congress state or imply that the States' BACT determinations are merely preliminary. Yet the Ninth Circuit erroneously held that the States' BACT decisions are only "initial" and are subject to EPA's "ultimate" authority to override the States' determinations. Pet. App. at 10a-11a. The Ninth Circuit wrongly relied on 42 U.S.C. § 7413(a)(5)(A) and 42 U.S.C. § 7477 for EPA's new-found "ultimate" authority to veto state BACT decisions. Those provisions permit EPA to issue enforcement orders to redress violations of the Act's "requirements," but not to preempt discretionary state

decisionmaking with which EPA simply subjectively disagrees. Despite the clear statutory assignment of authority to the States, the Ninth Circuit's decision effectively strips the State of Alaska of its primary role of weighing the statutory BACT factors in its implementation of its PSD program.

In addition to misconstruing the Act's BACT and enforcement provisions, the Ninth Circuit's decision, if uncorrected, will significantly harm the States' environmental programs and, as a result, will harm the citizens of the States and the nation as a whole.

First, as illustrated by this case, the environment itself will suffer if the States are squeezed out of their crucial role in PSD permitting decisions. Congress had a good reason for explicitly making the States, not EPA, responsible for determining BACT: The States simply do a better job than EPA can or will do in making these essentially local judgments. The end-result of the Ninth Circuit's decision, if affirmed, will be flawed decisions with attendant adverse environmental and social consequences.

Second, permit applicants will be uncertain as to whether and when EPA will choose to inject itself into the state permit-issuance process, and as to whether they can participate in that process with confidence that they can rely on the state-issued PSD permit. That uncertainty, in turn, will frustrate growth, thereby depriving the States of control over the "growth management decisions" that Congress specifically "left . . . for resolution by the states." *Alabama Power Co. v. Costle*, 636 F.2d 323, 364 (D.C. Cir. 1980).

Third, the administrative process will be thrown into disarray; state administrative procedures for hearings on

and review of permitting decisions will be rendered superfluous as applicants work directly with EPA instead of through State air programs. Absent defined procedures in the context of administrative hearings, there will be no opportunity to test the bases for EPA's insistence on alternative BACT determinations, and no genuine administrative records to allow informed judicial review. EPA's bypassing of orderly administrative review procedures will have two negative consequences: It will impair the quality of ultimate BACT decisions while, ironically, making EPA's unilateral determinations virtually unreviewable.

ARGUMENT

I. The Ninth Circuit's Decision Wrongly Deprives The States Of Their Authority To Determine BACT

A. Congress Expressly Reserved To The States Specific Authority Under The Clean Air Act

In the Clean Air Act, Congress assigned distinct roles to the federal and state governments. A key federal role is the promulgation of the NAAQS, which define the amount of pollutants that may exist in a given area without harming public health and welfare. 42 U.S.C. § 7409. Despite EPA's responsibility for setting the NAAQS, which apply nationally, the Act makes clear that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." *Id.* § 7401(a)(3). Thus, the States, through their approved State Implementation Plans ("SIPs"), are charged with implementation of the federally-set NAAQS. *Id.* § 7410. As this Court has recognized, "Congress plainly left with the

States, so long as the [NAAQS] were met, the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976); *see also Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

Congress also gave the federal and state governments distinct functions in the implementation of the PSD program. EPA sets the allowable increments that may be consumed for a particular regulated pollutant. 42 U.S.C. § 7476(a).[1] The States, meanwhile, determine the areas in which the increments will apply, and ensure through their SIPs that the increments are not exceeded. *Id.* § 7474(a); 40 C.F.R. § 51.166(a) (1999). EPA "is without authority to dictate to the States their policy for management of the consumption of allowable [PSD] increments." *Alabama Power*, 636 F.2d at 361. Rather, "assuming such compliance" with the maximum limitations defined by EPA through the increments, "growth-management decisions were left by Congress for resolution by the states." *Id.* at 364.

When Congress gave the States responsibility for managing the PSD increments, it acted consistently with EPA's own earlier judgment that implementation of the PSD program is uniquely local in nature:

> Any policy to prevent significant deterioration involves difficult questions regarding how the

[1] Congress has set PSD increments for two pollutants itself. 42 U.S.C. §§ 7473(b), 7475(d). EPA must set allowable PSD increments for all other regulated pollutants for which it establishes NAAQS. *Id.* § 7476(a).

> land in any area is to be used. Traditionally, these land use decisions have been considered the prerogative of local and State governments, and . . . the primary opportunity for making these decisions is reserved for the States and local governments. . . . In the Administrator's judgment, this matter normally should not be handled at the Federal level, . . .

39 Fed. Reg. 31000, 31001 (Aug. 27, 1974).

Not surprisingly in light of the Act's allocation to state and local governments of responsibility for "air pollution prevention . . . and air pollution control at its source," 42 U.S.C. § 7401(a)(3), Congress also charged those States with EPA-approved SIPs with responsibility for BACT determinations. The Act defines BACT as "an emission limitation . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility . . . " 42 U.S.C. § 7479(3); *see also* 40 C.F.R. § 51.166(b)(12) (1999).[2]

Beyond making clear that States – not EPA – would select BACT, Section 169(3) confirms that the determination is a discretionary one. While the Act identifies the factors that the States must consider, the ultimate selection of BACT represents a judgment call, and there is no one "correct" BACT for a given source. That is precisely what Congress was thinking when it enacted the PSD provisions: "The decision regarding the actual implementation of best

[2] States with approved SIPs are the "permitting authorit[ies]" under Section 169(3).

available technology is a key one, and the [Act] places this responsibility with the State, to be determined in a case-by-case judgment." S. REP. NO. 95-127, at 31 (1977). Moreover, "the phrase [BACT] has broad flexibility in how it should and can be interpreted, depending on site." *Id.*

Thus, the plain language of the statute itself, its legislative history, decisions of this Court and lower federal courts, and EPA's own interpretation of the PSD program confirm that States must determine BACT for a particular source, and must exercise discretion in that process.

B. EPA May Not Usurp Reserved State Authority Through Enforcement Orders

Here, the State of Alaska exercised its authority to determine BACT in accordance with the Act. It considered a variety of possible technologies in light of the statutory factors listed in Section 169(3); it engaged in a lengthy dialogue with the permit applicant, EPA, and other interested parties; it independently researched the pros and cons of the sundry of potentially available technologies; it prepared preliminary, draft final, and final technical analysis reports; and it ultimately selected a technology known as "Low NOx" as BACT.

Where did Alaska go wrong? Stated bluntly, it had the audacity to disagree with EPA and select a technology different from the one that EPA favored – selective catalytic reduction or "SCR". EPA, offended by Alaska's failure to march in step, responded by issuing a series of enforcement orders under Sections 113(a)(5)(A) and 167 of the Act. Section 113(a)(5)(A) permits EPA to issue orders prohibiting the construction of new sources or the modification of

existing sources when the agency "finds that a State is not acting in compliance with any requirement or prohibition of [the Act]" relating to such construction or modification. 42 U.S.C. § 7413(a)(5)(A). Section 167 permits orders "as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements" of the PSD provisions. *Id.* § 7477.

EPA asserted, and the Ninth Circuit accepted, that Sections 113(a)(5)(A) and 167 vest EPA with broad authority to use enforcement orders to override a State's BACT selection whenever EPA disagrees with the State's "improper determination." Pet. App. at 10a. The Ninth Circuit reasoned as follows: (a) Subjecting a facility to BACT is a "requirement" of the Act and its PSD sub-part, *id.* at 8a; (b) when EPA disagreed with Alaska's choice of Low NOx as BACT, it concluded that Alaska "had not complied with the BACT requirement," *id.* at 9a; and (3) ergo, EPA could invoke its enforcement powers to override Alaska's decision, *id.* at 10a-11a. On this basis, the Ninth Circuit held that Alaska "made the initial BACT decision," *id.* at 9a, but "EPA has the ultimate authority" to determine BACT, *id.* at 10a-11a.

The Ninth Circuit's logic, however, is overly simplistic and flawed. It assumes that the "requirement" of the Act, for purposes of Sections 113(a)(5)(A) and 167, is the choice of one particular technology as BACT, when, in fact, the Act requires only that a State undertake a BACT analysis and select the technology that the State deems appropriate in light of the statutory factors (and one that does not exceed the maximum increment consumption). The State's chosen technology might or might not coincide with EPA's choice of BACT, if EPA were the decision maker. The point, however, is that EPA is *not* the decision maker under

Section 169(3), whose plain language assigns that role to the "permitting authority," namely, the State of Alaska in this case. The Ninth Circuit essentially ignored that section, which, by defining BACT as a discretionary State judgment, necessarily defines what the BACT "requirement" is under the Act. Yet, the Ninth Circuit inexplicably concluded that "[n]othing in the BACT definition of Section 169(3) limits the EPA's authority." Pet. App. at 11a.

The Ninth Circuit held that "[t]he structure and legislative history of the Act" further support the court's endorsement of a radical shift in power from the States to EPA. *Id.* at 9a. The court reviewed various amendments to the Act since its original enactment in 1963, concluding that "[f]ollowing disappointing state response to air pollution concerns, Congress has consistently increased over time federal authority in pollution control." *Id. Amici* States do not dispute the legislative events that the court summarized; they do, however, challenge the relevance of those events to the issue in this case.

For example, the fact that in 1970 Congress directed EPA to publish NAAQS and directed the States to develop SIPs to meet the NAAQS, *see id.*, has no bearing on the then-non-existent PSD program; the federal concern in 1970 over "dirty air" areas was distinct from the later focus of the PSD program on preserving "clean air" areas. Moreover, as discussed *supra* at 4-5, but ignored by the Ninth Circuit, Congress expressly allocated authority to *implement* the NAAQS to the States. Similarly, the "internal industry 'pressure'" referred to by the Ninth Circuit as one basis for Congress's adoption of the PSD provisions in 1977, Pet. App. at 10a (quoting legislative history), resulted in federally-set maximum increments, but *not* federal control over the implementation of the PSD program; rather,

Congress specifically gave that responsibility to the States. *See supra* at 4-5.

Missing from the Ninth Circuit's analysis of the Act's historical development are the most important points of all – acknowledgments that (a) in 1977, Congress unambiguously gave the States the primary authority to implement the PSD program, including the duty to determine BACT, and (b) Congress has not reduced that authority since 1977.

Under the Ninth Circuit's decision, EPA completely controls a State's air program, both under the PSD provisions (to which Section 167 applies) and under the State's SIP (to which Section 113(a)(5) applies). No matter that Congress specifically allocated authority to the States – EPA's enforcement power trumps that State authority. No matter that the particular issue calls for the exercise of discretion and that the Act does not require one objectively-definable outcome – if EPA disagrees with the State's subjective analysis, it may steamroll the State through the exercise of its "ultimate" enforcement authority.

The Ninth Circuit's essential holding – which the States urge this Court to reverse – is that the Act gives the States only "initial responsibility" for PSD permitting decisions, but that "EPA has the ultimate authority to decide" BACT. Pet. App. at 10a-11a. This sweeping pronouncement, based on an unduly-broad construction of the word "requirement," relegates state programs to mere preliminary involvement with no substantial decision-making power in the issuance of PSD permits. State authority to determine BACT, and likely with respect to other issues under the Act as well, is rendered an illusion.

Truly, the Ninth Circuit's decision – upholding EPA's effort to bootstrap a difference of opinion into a violation of law – turns the Clean Air Act on its head.

II. The Ninth Circuit Decision Will Harm State Air Programs And Interests

A. Divesting States Of Their Primary Authority To Determine BACT Will Impede Informed Decisions

The cooperative federalism embodied in the PSD program – with EPA setting the nationally-applicable standards and the States implementing those standards – is not merely what Congress mandated; it makes good sense. Back in the early years of the Clean Air Act, Professor Richard Stewart noted the "sobering fact ... that environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington." Richard B. Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1266 (1977).[9]

[9] In 1977, Professor Stewart also bemoaned the poor record of the States in the implementation of their own and the then-existing federal environmental laws. *Id.* In the quarter century since Professor Stewart wrote, however, the States have undeniably met the challenge in the realm of environmental law. *See generally* R. Steven Brown, *The States Protect the Environment*, ECOSTATES (Summer 1999) (http://www.sso.org/ecos/publications/statesarticle.htm) (reviewing statistics and trends that support the author's conclusion that "[t]he States have become the primary environmental protection agencies across the nation").

Twenty-five years of experience have borne out those early observations. Commentator after commentator has opined, and study after study has confirmed, that "[s]ubstantial participation by state officials and state bureaucracies is essential if the federal government is to achieve its environmental goals." John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1216 (1995). "The local and regional nature of many environmental problems means that local knowledge and expertise is necessary to develop proper solutions. Such localized knowledge is simply beyond the reach of even the most intrepid federal regulators." Jonathan H. Adler, *Let 50 Flowers Bloom: Transforming the States into Laboratories of Environmental Policy*, 31 ENVT'L. L. REP. 11284, 11286 (Nov. 2001);[4] see also Mary A. Gade, *When the States Come Marching In*, 10 NAT. RES. & ENV'T 3, 4 (1996) ("[S]tates are closest to their constituents and problems, bringing a necessary sensitivity and perspective to local environmental issues that even EPA's ten regional offices, often many hundreds of miles away, can't have."); Nat'l Acad. of Public Admin., Report to Congress, *Setting Priorities, Getting Results: A New Direction for the Environmental Protection Agency* 2 (1995) ("EPA and Congress need to hand more responsibility and decision-making authority over to the states and localities. . . . [In] those states that are capable and willing to take over functions

[4] Professor Adler advocates an increased state role in *establishing* environmental policy, including, for example, the setting of pollution standards. The issue in this appeal is far tamer – whether the States are entitled to exercise the discretion that Congress gave to them in *implementing* policies that EPA has set and that are not challenged here.

from the federal government, . . . EPA should stay out of the way, with no second-guessing.").

A meaningful state role in implementation is imperative for obvious reasons. Ours is a huge and diverse nation "with an astonishing range of environmental conditions and problems." Dwyer, *supra*, at 1218. To wit:

> Differences in climate and weather (*e.g.*, patterns of temperature, wind, rainfall, humidity), geography (*e.g.*, deserts, mountains, plains, coastal regions), the relative importance of sources and types of pollution (*e.g.*, cars, large utilities and factories, numerous small sources), environmental and public health risks (*e.g.*, special need for visibility control, size of affected human population), and economic conditions confound attempts to have a successful, highly centralized regulatory program. . . . The practical need to tailor implementation and enforcement to local conditions requires decisionmakers who have, in addition to an adequate knowledge of these conditions, a sympathetic orientation toward local conditions. Effective implementation requires some consideration and accommodation of local concerns. Precisely because they are local, and locally accountable, state and local officials bring that knowledge and orientation to implementation and enforcement.

Id.

The events in Alaska that gave rise to this case prove the wisdom of congressional assignment to the States of authority for PSD permitting decisions. Alaska took its implementation responsibilities seriously and committed ample resources to select the most effective, yet feasible, control technology. Moreover, unlike EPA, the State had a

unique appreciation for both the Mine's importance to the local economy, and for its actual operation. Thus, Alaska selected Low NOx in part because the State could not economically justify the steeply higher cost of SCR in light of the value of the Mine's expansion in a region of the State marked by severe underemployment and largely populated by Native Americans. J.A. 206-08.

Equally important, during the permitting process, Alaska appreciated a fact that was lost on EPA – that the State could achieve an even greater emissions reduction through the negotiated installation of Low NOx on all seven of the Mine's generators, even though the Act required BACT on only two engines. Alaska had concluded that the use of Low NOx on all seven engines would have achieved "nearly the same, if not a greater . . . , level of control as installing SCR on only two engines." C.R. 21-005. The State also recognized that, if it were to deem EPA's choice of technology, SCR, as BACT for only two engines, with no controls for the remaining five generators, Cominco would have an economic incentive to use the far-costlier SCR-equipped engines for back-up purposes only. That, in turn, would largely eliminate the potential NOx reductions from SCR: "If an SCR controlled unit is on standby throughout the year, then the SCR scenario could emit up to *396 more tons of NOx per year* than the Low NOx scenario for all seven units." C.R. 17-045. (emphasis added) Ironically, EPA used its usurped authority to reject maximum emissions reductions in favor of its preferred technology.

B. Permitting EPA To Veto State Selection of BACT Will Lead To Uncertainty Among Permittees And Applicants, Which Will Frustrate The Act's PSD Program

Beyond increasing the likelihood of out-of-touch and flawed judgments, EPA's intrusion into the state role of determining BACT, if permitted, will inject a disturbing degree of uncertainty into the permitting process. No longer will the States have any real authority and, hence, no longer will applicants be able to rely on the State's word during negotiations or even on the State's issuance of a permit. Rather, applicants will have to guess whether EPA will preempt the State's judgment at any point in or after the permitting process. Or the State might refuse to issue a permit on terms dictated by EPA rather than by the State's independent exercise of its discretion to determine BACT. In both circumstances, the logical outgrowth of the uncertainty created by EPA's power-grab will be permitting paralysis. Applicants likely will do nothing – they simply will not undertake construction or modification of facilities that would require PSD permits. So much for Congress's expectation of state control over inherently local "growth-management decisions." *Alabama Power*, 636 F.2d at 364.

C. EPA's Reliance On Enforcement Orders Will Render Superfluous The Administrative Process For Determining BACT, Resulting In Poor And Largely Unreviewable BACT Determinations

As part of every EPA-approved SIP, state BACT determinations are subject to testing in administrative hearings and to judicial review. State procedures for

hearings on PSD permitting decisions ensure that those decisions are tested by exposure to diverse public comment, ensure fairness and an opportunity for interested parties to be heard, and enhance the quality of judicial review. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (C.A.D.C. 1983). All of those goals are defeated if EPA is allowed to reach its own independent BACT decision and then force that decision on states and permittees through enforcement orders. EPA's unilateral decision in this case was made without the benefit of a public hearing, without considering comments from interested parties, without weighing the statutory factors required in the BACT definition, and without the fundamental background necessary to consider those factors in a way that is sensitive to the needs of the local area.

Congress provided for administrative hearings on PSD permit decisions, and did so expressly to allow (among other interested parties) the "representatives of the [EPA] to appear and submit written or oral presentations on . . . control technology requirements." 42 U.S.C. 7475(a)(2). Congress clearly intended for EPA to participate in the state administrative process to help determine BACT, and the basic purpose of that process is to enhance the quality of administrative decisions. The Ninth Circuit's conclusion that EPA is free to refuse to participate in the state administrative process, then criticize the state permitting agency because it failed to provide an adequate justification for its BACT decision defies logic, is unfair to all who participate in the state process, and undermines the system of cooperative federalism that Congress enacted to allow the local persons who are directly affected to have a say in these major decisions that significantly impact their lives.

When Congress granted EPA authority to issue enforcement orders for violations of "requirements" of a SIP or the Act's PSD provisions, it did not intend EPA to use that limited authority as a substitute for participation in and respect for the State's PSD permit issuance process. Yet, in this case EPA declined to challenge Alaska's BACT determination at the state administrative level, thereby denying the parties a full and fair hearing on the issues, and depriving the State of the chance to develop a complete administrative record in support of its BACT decision. EPA instead unilaterally determined BACT based on partial and, in some cases, inaccurate information, and forced Alaska to present the BACT issue to a federal court of appeals on an incompletely-developed administrative record. If EPA's new found authority to make unilateral BACT decisions outside the statutorily required administrative process is allowed to stand, the risk of flawed decision making on important environmental questions in future PSD permitting proceedings will increase.

Once again, the instant case proves the States' point. EPA's cavalier choice of its pet technology, coupled with its refusal to participate in the Alaska administrative process, led to fundamental errors in EPA's analysis, which the Ninth Circuit adopted in its decision. For example, the Ninth Circuit accepted EPA's position that "there were no recent permit decisions involving BACT determinations for diesel engines used as primary power generators," Pet. App. at 14a, when that is patently untrue. An August 1999 memorandum prepared as part of the State's in-depth analysis of the BACT issue, stated that "no similar cases in Alaska have required SCR as BACT," Certified Rec. 21-018, *not* that there are no similar cases. In fact, even the paltry documentation that EPA assembled unilaterally in

lieu of a fair and completely-developed administrative record shows *three* recent Alaska decisions for comparable diesel-fired generators in Unalaska, St. Paul, and Ketchikan; in each case, the State had selected as BACT a control technology less effective than Low NOx – not SCR. 44-007, 45-030.

Had EPA participated in the administrative process that Congress mandated, those facts and others would have received a more meaningful discussion, and perhaps led to more thorough and more reasoned analysis by the agencies and courts that reviewed the record. EPA's refusal to participate in that process deprived the State of Alaska, its citizens, and its environment of the reasoned analysis of PSD permit applications that Congress intended them to receive.

CONCLUSION

One commentator has observed that "[t]hough generally described as 'cooperative federalism,' the relationship between the states and federal government in environmental policy often resembles that between a feudal lord and his serf." Adler, *supra*, at 11286. The EPA enforcement orders that the Ninth Circuit approved go a long way toward institutionalizing a feudal relationship between the States and EPA under the Clean Air Act's PSD program. But that is not what Congress intended and it is not good for the environment or for the citizens of the States.

Therefore, *Amici* States urge this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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In The
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT IN SUPPORT OF PETITIONER STATE OF ALASKA

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, The Center for Energy and Economic Development (CEED) submits this brief *Amicus Curiae* in support of Petitioner State of Alaska. Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.[1]

Amicus, CEED, is a non-profit organization formed by the nation's coal-producing companies, railroads, a number of electric utilities, equipment manufacturers, and related organizations for the purpose of educating the public, including public-sector decision-makers, about the benefits of affordable, reliable, and environmentally compatible coal-fueled electricity. *Amicus* CEED members are engaged in socially valuable work. That is, they provide essential goods and services that improve and maintain the high quality of life enjoyed in this country.

As demonstrated herein, the implications of Petitioner's case far transcend its individual situation and create problems of nationwide magnitude. Moreover, *Amicus* believes that the ruling of the Ninth Circuit is inconsistent with a clearly-stated legislative act of Congress and is also at odds with the precedents of this Court that recognize the state-federal relationship under the federal Clean Air Act (CAA). Further, under the rule of the

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Ninth Circuit, tremendous uncertainty has been unnecessarily injected into the permitting process for new electrical generation facilities. *Amicus* believes that this uncertainty will unduly interfere with public and private efforts necessary for meeting the current and growing demand for such facilities.

OPINIONS BELOW, JURISDICTION, STATUTORY PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Amicus CEED hereby adopts Petitioner's statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case. In addition, *Amicus* wishes to succinctly state the statutory scheme involved in this case and its relation to the State of Alaska. New Source Review (NSR) is the federal CAA permitting program that regulates the construction of major new stationary sources and major modifications to existing stationary sources. EPA's NSR regulations require such sources to perform health and visibility/air quality impact analyses, install stringent air pollution control equipment, and obtain permits for new construction at major stationary sources. NSR consists of more than one distinct subprogram: Prevention of Significant Deterioration (PSD) is for areas in attainment with health-based National Ambient Air Quality Standards (NAAQS); Non-attainment NSR (NNSR) is for those that are not in attainment with NAAQS.

The current PSD program is set forth in two sets of regulations. One set is 40 CFR § 52.21, which is part of the federal PSD program that applies as part of a federal implementation plan (FIP) for states that do not have an approved PSD program meeting the regulatory requirements of 40

CFR § 51.166 – the other set of regulations containing minimum standards for PSD provisions in State Implementation Plans (SIPs). In this and most cases, Alaska has an EPA approved PSD SIP program which delegates authority to the State of Alaska to perform health and visibility and air quality impact analyses, require installation of air pollution control equipment, and issue permits under the State administered PSD program.

Among the PSD requirements Congress imposed in the CAA is that the State require application of Best Available Control Technology (BACT) to any major modification at a major emitting facility subject to the PSD program. 42 U.S.C. § 7475(a)(4). The CAA mandates that BACT limits are to be determined on a case-by-case basis by the permitting authority. As Congress explained, in making this "key decision **[BACT]** . . . the *State* is to take into account energy, environmental, and economic impacts and other costs of the application of best available control technology. The weight assigned to such factors is to be determined by the ***State***." Sen. Rep. No. 127, 9th Cong., 1st Sess. 31 (1977) reprinted in 3 *1977 Legis. Hist.* at 1405 (emphasis added).[2]

[2] *See also 1977 Legis. Hist.* at 729 (emphasis added) ("One objection which has been raised to requiring the use of the best available control technology is that a technology demonstrated to be applicable in one area of the country is not applicable at a new facility in another area because of *difference[s] in feedstock material, plant configuration or other reasons*. For this and other reasons, *the committee voted to permit emission limits based on best available technology on a case-by-case judgment at the State level*. This flexibility should allow such differences to be accommodated and still maximize the use of improved technology.") (emphasis added).

SUMMARY OF ARGUMENT

The Ninth Circuit's decision, allowing EPA to usurp the authority that the federal CAA clearly delegates to the States, poses a grave threat to the ability of the States to make Best Available Control Technology (BACT) and other important discretionary decisions under the CAA. Under both the express statutory provisions involved in this case *and* the structure of the federal CAA, EPA's actions represent an invasion of the prerogatives left to the States in fashioning individual CAA "Prevention of Significant Deterioration" (PSD) permits. As such, the Ninth Circuit's decision upholding EPA's desire for "national consistency" is antithetical to the express statutory text and framework created by Congress.

Both the Clinton and Bush administrations have determined that more than 1,000 new electricity generation facilities are needed in this country in order to meet future demands. The problems presented by this case involve issues of national importance and call into question the ability of the States to make decisions entrusted to them by Congress to, among other things, ensure both clean air and adequate energy supplies for their citizens. This Court should reverse the Ninth Circuit's decision in order to resolve the conflict created by this ruling and to restore greater certainty to a process that is critical to balancing environmental protection with meeting the demand for additional future energy development.

REASONS FOR OVERTURNING THE NINTH CIRCUIT'S DECISION

I. THE NINTH CIRCUIT'S DECISION POSES A GRAVE THREAT TO THE ABILITY OF THE STATES TO ADDRESS A REAL AND GROWING NATIONAL ENERGY CRISIS

The Bush Administration has determined that, "Over the next ten years, demand for electric power is expected to increase by about 25 percent, and more than 200,000 megawatts of new capacity will be required." National Energy Policy, *Report of the National Energy Policy Development Group* (May 2001). These current and future energy and production needs will be local, regional, and national. Recognizing these needs, Congress gave the States "great flexibility" to achieve the goals of the CAA, *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981), including the ability to allow economic development (which, of course, includes power generation) within the tandem duty of preserving air quality in clean air areas. As the D.C. Circuit explained in *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), "[I]n the allocation of responsibilities made by Congress" with respect to preventing the significant deterioration of air quality, "maximum limitations have been set." *Id.* at 364. "These must be observed by the states, but assuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id.*

A State's authority to determine BACT for a particular source is "key" to its ability to "manage [its] allowed internal growth" under the CAA. *Id.* at 364. The "flexible approach" chosen by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting

facility, and such other considerations as *anticipated and desired economic growth for the area*." S. Rep. No. 95-127, at 31 (emphasis added). Congress' decision to make BACT "strictly a State and local decision," *id.*, makes sense, as it is the States – not the EPA – that are most sensitive to particular local needs and concerns. Further, that Congress required BACT to be determined on a "case-by-case," facility-specific basis, 42 U.S.C. § 7479(3), highlights the importance of such local considerations.

Amicus submits that the Ninth Circuit's decision, allowing EPA to dictate BACT to the States, would allow EPA to "assume control" of the States' "developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level consistent with" the limitations set out in the CAA. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 80 (1975). As such, the import of the Ninth Circuit's decision is plainly not what Congress intended. *See* S. Rep. No. 95-127, at 32 ("Nothing could be more detrimental to the intent of [the PSD] section and the integrity of [the] act than to have the process encumbered by bureaucratic delay.").

The Ninth Circuit's determination directly threatens the ability of the States to effectively and efficiently permit facilities that will provide the much needed power generation, in the next ten to twenty years.[3] By threatening the

[3] Contrary to EPA's actions in this case, the avowed intent of the Bush administration is to simplify the PSD permitting process and allow facilities to more quickly, reasonably, and efficiently make process changes that respond to marketplace needs and demands. EPA finalized NSR/PSD reforms on December 19, 2002, that are aimed at allowing "sources more flexibility to respond to rapidly changing markets and to plan for future investment in pollution control technologies." Available at

(Continued on following page)

States' ability to make BACT determinations, and other discretionary state determinations under the CAA, the bureaucratic delays sought to be avoided when authorizing the CAA will become inherent in energy project development. These bureaucratic delays will have an unnecessary chilling effect on public and private incentives needed for developing such projects – thereby delaying or prohibiting the resolution of critical energy deficiencies. Where, as here, EPA can override the decision of a State permitting authority at any time, even after the public comment period has closed, the permittee has no reason to believe that the permit issued by the state agency has any real meaning or allows construction of the permitted project. As such, the CAA's PSD permitting process will become an untenable obstacle to the states in their efforts to address current and growing energy demands.

II. THE NINTH CIRCUIT'S DECISION CREATES AN UNNECESSARY AND UNREASONABLE PERMITTING OBSTACLE FOR FUTURE ELECTRICAL GENERATION PROJECTS

In order to achieve the environmental protection and economic development goals of the CAA, the process of obtaining a PSD permit can be a very involved process and require the investment of substantial resources. Further, from a practical standpoint, *Amicus* members' experiences

http://www.epa.gov/air/nsr-review/. "The changes are intended to provide greater regulatory certainty, administrative flexibility, and permit streamlining, while ensuring the current level of environmental protection and benefit derived from the program and, in certain respects, resulting in greater environmental protection." *Id.*

in obtaining PSD permits, which are required to be obtained by an "applicant" pursuant to CAA § 165 before any construction of a project can begin, involve a minimum time period of 18 months and can often last as long as three years.

Amicus CEED members' experience is that the process of obtaining a PSD permit includes complex air impacts modeling, which typically requires specialized outside engineers and consultants to create. The permitting process also includes engineering calculation and estimation of emissions, review of the modeling results and impacts on ambient air quality, engineering studies and proposals from the permit applicant and equipment vendors (both production equipment and air control equipment), meetings with the permitting agencies' engineers and technical experts, and an extensive public notice and comment administrative process. As such, the CAA PSD process is expensive, time-consuming, and challenging.

Under the Ninth Circuit's decision, even after more than 18 months of planning, engineering, meeting, and discussing the proposed permit with the State regulatory agency and the public, the EPA may step in (as EPA did in this case by *not* participating in the State's administrative process) and demand a different result than that accepted by the State. The practical and logistical effect of EPA's late participation and delayed action would be to require the permittee to essentially start the process all over again. When a different type of control equipment is required than that originally proposed, engineered, studied, and modeled by a permit applicant, it is not merely a matter of changing a few words in a permit application. The permit applicant must instead essentially begin anew

with engineering and studying the control equipment demanded by EPA, run a new air quality impacts model, amend the permit and reopen the comment period, and negotiate finalization of the permit with the state permitting authority. Thus, the EPA actions endorsed by the Ninth Circuit have imposed numerous practical burdens that were neither accounted for nor considered by the Ninth Circuit.

As the Ninth Circuit has, itself, previously observed in a case concerning the licensing of a small electrical generation facility:

> The hardship is the process itself. Process costs money. If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others, with no revenue, no near-term prospect of revenue, and no certainty that there ever will be revenue. Meanwhile, politics, laws, interest rates, construction costs, and costs of alternatives change. Undue process may impose cost and uncertainty sufficient to thwart the federal determination that a power plant should proceed. As the Supreme Court explained in an analogous context, "to require the industry to proceed without knowing whether the state regulation is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens of California." *Pacific Gas*, 461 U.S. at 201-202, 103 S.Ct. at 1721.

See Sayles Hydro Associates v. Maughan, 985 F.2d 451, 454 (9th Cir. 1993).

As recognized previously by the Ninth Circuit in the *Sayles* case and, more importantly, by this Court in *Pacific Gas*,[4] the addition of *undue* process, particularly when directly at odds with the process sanctioned by Congress, greatly hamstrings the ability to meet current and future energy demands. Such additional *undue* process would only confound the recent finding made by the Bush Administration:

> A fundamental imbalance between supply and demand defines our nation's energy crisis. . . . [i]f energy production increases at the same rate as during the last decade our projected energy needs will far outstrip expected levels of production.

See National Energy Policy, *Report of the National Energy Policy Development Group* (May 2001), p. viii.[5]

III. THE NINTH CIRCUIT'S DECISION USURPS THE ROLE CONGRESS GAVE TO THE STATES IN PERMITTING NEW ELECTRIC GENERATION FACILITIES UNDER THE CLEAN AIR ACT

Congress declared in the federal CAA that "Air pollution prevention and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(3). Despite Congress' clear

[4] *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 201 (1983).

[5] Available at http://www.energy.gov/HQPress/releases01/maypr/energy_policy.htm.

emphasis on state primacy, the Ninth Circuit has held that "the EPA has the ultimate authority to decide whether [a] state has complied with the [Best Available Control Technology] BACT requirements of the Act." *Alaska DEC v. EPA*, 298 F.3d 814, 820 (9th Cir. 2002). *Amicus* submits that the Ninth Circuit's flawed decision merits prompt reversal because that Court failed to recognize that EPA's authority under the CAA is limited to acting when a State has failed to comply with requirements or prohibitions of the CAA and the requirements to make a BACT determination – a function much different than "ultimate review authority" over discretionary permitting determinations made by the State. *See* 42 U.S.C. § 7413 and § 7477.

Further, the Ninth Circuit's flawed decision stands in sharp conflict with decisions of this Court and the lower Courts concerning federal and state division of responsibilities under the CAA. For example, the Supreme Court, in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), addressed whether states could use CAA § 110(a)(3) to seek revisions of State Implementation Plans (SIPs) for the purpose of easing limitations on a single pollution source. This Court held that a state could do that so long as the revised plan would enable the state to attain and maintain national ambient air quality standards (NAAQS). *See Train*, 421 U.S. at 78. In interpreting CAA § 110, this Court stated:

> [T]he Act gives *the agency [EPA] no authority to question the wisdom of a state's choices of emissions limitations* if they are part of a plan which satisfies the standards of Section 110(a)(2), and the agency may devise and promulgate a specific plan of its own only if a state fails to submit an implementation plan which satisfies those standards. Section 110(c). Thus, *so long as the ultimate effect*

> *of a state's choice of emission limitations is compliance* with the national standards for ambient air, *the state is at liberty to adopt whatever mix* of emission limitations *it deems best suited* to its particular situation.

Train, *supra*, 421 U.S. at 79 (emphasis added).

Similarly, in recognition of the primacy of the states' role under the CAA, the Circuit Courts have rebuffed efforts by EPA to mandate specific emission limitations in SIPs. In *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), the D.C. Circuit specifically determined that EPA lacked the authority under CAA § 110 to condition approval of a SIP on the state's adoption of a particular control measure. Further, in *Bethlehem v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1977), the Seventh Circuit rejected an EPA effort to only partially approve a SIP, thereby rendering the state plan more stringent than the state intended, stating:

> [T]he Clean Air Act creates a partnership between the states and the federal government. The state proposes, though the EPA disposes. The federal government, through the EPA, determines the ends – the standards of air quality – but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through the state implementation plans and timetables of compliance. . . . The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states, . . . especially when, as in this case, the agency is overriding state policy.

The federal Courts of Appeals have consistently endorsed the statutory requirement that BACT be determined through a flexible balancing process by the permitting

authority. The U.S. Court of Appeals for the District of Columbia Circuit has pointed out, for example, that "BACT is defined, in general, as a level of control technology appropriate to the facts and *circumstances of the particular applicant.*" *Alabama Power v. Costle*, 606 F.2d 1068, 1085 (D.C. Cir. 1979) (emphasis added). Previously, the U.S. Court of Appeals for the Ninth Circuit observed that "the BACT determination is . . . *source specific.*" *Northern Plains Resource Council v. EPA*, 645 F.2d 1349, 1359 (9th Cir. 1981) (emphasis added). Further, the Ninth Circuit also previously correctly concluded that, while a particular control technology may be BACT for one plant, the permitting authority "might decide that for [another] . . . facility . . . [that technology is] inappropriate for economic *or* energy *or* environmental reasons." *Id.* (emphasis added). *See also*, *Sur Contra La Contaminacion v. EPA*, *et al.*, 202 F.3d 443, 447 (1st Cir. 2000). Unlike the present decision of the Ninth Circuit, other court decisions confirm what the language of the CAA makes plain: a BACT determination must be made on a case-by-case basis by the State after taking into account energy, environmental, and economic impacts and other costs. Uniformity is not mandated by the BACT provisions; flexibility is.

Despite EPA's objections to the contrary, Alaska did all that was required and more by reviewing the Red Dog Mine application and emission reduction proposals in accordance with the statutory requirements. Alaska's determination was based on a reasoned review of the environmental and economic impacts and consideration of all of the CAA § 165 statutory BACT factors. Ironically, the BACT determination made by Alaska also had a greater

net environmental and human health benefit than that required by EPA.

IV. THE NINTH CIRCUIT'S FLAWED DECISION RESTS ON NON-BINDING FEDERAL POLICY DIRECTIVES THAT UNLAWFULLY CONSTRAIN CLEAR STATE AUTHORITY

While the Ninth Circuit expressly upheld EPA's order vetoing the Alaska-issued PSD permit, *Amicus* wishes to underscore that this case also demonstrates how state authority and discretion in the permitting of new facilities is subject to increasing erosion. State authority is being usurped by the alarming trend of EPA and the federal land management agencies (*e.g.,* National Park Service, U.S. Forest Service) using "guidance documents" that seek those agencies' roles in the CAA permitting process at the expense of the states.

The Ninth Circuit correctly observed that Alaska was not bound by EPA guidance documents that have not been subjected to full public notice and comment under the Administrative Procedure Act. Nonetheless, the Ninth Circuit justified its decision to uphold EPA's Orders based on *its* determination that the low NOx control technology selected was not appropriate under EPA's more than ten-year old "draft" guidance document setting forth the "top-down BACT approach." *Alaska DEC v. EPA*, at 10. However, nowhere in the CAA and implementing regulations is there any reference to the "most stringent technology" or the "top-down BACT" approach that the Ninth Circuit relied on in upholding the EPA orders. Notably, the Ninth Circuit did not (and could not) cite any statute, regulation, or case law that imposes a legal obligation on an applicant or permitting authority that *requires* the "top down"

approach for interpreting and/or applying the statutory BACT factors.[6]

Contrary to the Ninth Circuit's decision, nowhere in the CAA is there any suggestion that certain of the BACT criteria – energy, environmental, and economic impacts and other costs – should be emphasized over others. Further, nowhere in the CAA or implementing regulations is there any indication that BACT limits must be the lowest emission limits that are technically and economically feasible (or technically and economically infeasible, as in this case) for a similar source or source category. Indeed, such an interpretation of the CAA would essentially make BACT limits equivalent to the statutorily *distinct* "lowest achievable emission rate" limits which Congress has imposed *only* on new or modified sources locating in nonattainment areas. *See* 42 U.S.C. § 7501(3). Further, nowhere in the CAA or Alaska SIP is there any

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[6] While the Ninth Circuit erroneously relied upon EPA's draft 1990 NSR Manual, the Court should have instead recognized that an agency policy or guidance, unlike a rule, "does not seek to impose, elaborate or interpret a legal norm" and cannot bind an agency (or the State in this case) to a "particular legal policy position." *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994). The Ninth Circuit's decision is thus inconsistent with federal jurisprudence recognizing that when agencies apply guidance in a direct and substantive fashion, federal courts have uniformly set those administrative actions aside and required federal agencies to comply with the notice and comment requirements of § 553 of the federal Administrative Procedure Act (APA). *See Paralyzed Veterans of America v. D. C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (quoting *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 987, 100 (1995). *See also, Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Caruso v. Blockbuster-Sony Music Entertainment Center*, 174 F.3d 166, 176-178 (3d Cir. 1999).

presumption that some technology is BACT simply because it has been determined to be BACT for a given type of emission source in another location or for another industry. Congress recognized that the balancing test is mandatory simply because site-specific considerations will warrant emphasis on different considerations. *1977 Legis. Hist.*, at 729.

The State of Alaska was required to and did "transmit to the Administrator [EPA] a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to consideration of such permit." *See* 42 U.S.C. § 7475(d). The Ninth Circuit stated that "In July 1999, the EPA entered the discussion over Cominco's application at the urging of the National Parks Service, which had expressed concern that the 'nitrogen oxide emissions . . . *could* affect vegetation at Cape Krusenstern National Monument and Noatak National Preserve.'" *Alaska DEC*, at 817. Notably, the speculative comments from the National Park Service (NPS), and the EPA subsequent involvement in the permitting action, came *after* the close of the public comment period on the proposed permit for the Red Dog Mine.

Under the CAA, FLMs are required to protect the air quality related values of any lands within a *Class I* area and to consider whether a major emitting facility will have an adverse impact on such values. *See* 42 U.S.C. § 7475(d)(2)(B). However, the CAA neither mandates nor carves out a role for FLMs in Class II areas. The Cape Krusenstern National Monument and the Noatak National Preserve are not mandatory Class I areas and have not been designated Class I areas under the review and recommendation authority of the NPS. Despite EPA and

the NPS's late entry into the State of Alaska's administrative process, the Ninth Circuit gave full credence to the administrative alternatives of EPA and the NPS based upon purported authority contained in agency guidance documents but *not* regulatory provisions.

CONCLUSION

Amicus submits that the Ninth Circuit's opinion is bad law, is injurious to the present and future public welfare, has no place in federal jurisprudence, and should be set aside.

Respectfully submitted,

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STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR ENVIRONMENTAL DEFENSE, THE NATIONAL PARKS CONSERVATION ASSOCIATION, THE NORTHERN ALASKA ENVIRONMENTAL CENTER AND THE ALASKA COMMUNITY ACTION ON TOXICS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Environmental Defense (formerly the Environmental Defense Fund) is a national nonpartisan, nonprofit organization representing more than 300,000 members nationwide. Since 1967 it has linked science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems. Environmental Defense has helped design such landmark clean air programs as the market-based pollution cap and allowance trading program adopted in the 1990 Clean Air Act amendments to abate acid deposition. Protecting public health and the environment from harmful airborne contaminants is a core organizational mission.

The National Parks Conservation Association ("NPCA") is the only nonprofit citizen organization solely dedicated to protecting, preserving and enhancing the U.S. National Park System for the benefit of present and future generations. Founded in 1919, NPCA currently has over 300,000 members from all fifty states. NPCA has a longstanding interest in the use of the Clean Air Act and the federal government's responsibility to protect air quality and visibility in National Park units, including the Noatak National Preserve and the fifteen other National Park units in Alaska.

The Northern Alaska Environmental Center (Northern Center) promotes environmental conservation in Interior and Arctic Alaska through advocacy, education, and sustainable resource stewardship. The organization is a leading conservation voice for Interior and Arctic Alaska. Northern Center was founded in 1971 by a group of

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici* made a money contribution for the preparation or submission of this brief. This brief is being filed with the written consent of the parties, and the corresponding documentation is simultaneously being filed with the Court.

concerned residents and now has 1,100 members, of which 40% are from the Fairbanks area. Northern Center has members who visit, recreate, and rely on the natural resources of the Red Dog Mine region. True to its grassroots origins, Northern Center focuses on projects, such as enforcement of environmental protections at the Red Dog Mine, responsive to its members' concerns.

The Alaska Community Action on Toxics ("ACAT") is a nonprofit organization based in Anchorage. Its mission is to protect human health and the environment from the effects of toxic contaminants, and it represents about 300 Alaska residents. ACAT is dedicated to achieving environmental justice and ending production and release of toxic chemicals.

STATEMENT

Petitioner challenges orders of the United States Environmental Protection Agency ("EPA") pursuant to Sections 113(a)(5) and 167 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7413(a)(5), 7477, prohibiting construction of a new power generation unit, known as MG-17, operated by Teck-Cominco, Inc. ("Cominco"), at the Red Dog Mine in northwest Alaska. EPA issued the orders after concluding that Cominco's permit, granted by petitioner as permitting authority, failed to comply with the Act's requirement that major emitting facilities install the "best available control technology" ("BACT") to prevent significant deterioration of air quality. 42 U.S.C. § 7475(a)(4). Petitioner approved the use of a control technology approximately one-third as effective as another it had identified as technically feasible, environmentally preferable, and economically affordable, on the basis of unspecified "competitive impacts" and the company's "contributions" to the region. The court of appeals upheld EPA's authority to enforce the BACT requirement.

The Clean Air Act. The Clean Air Act amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, were enacted "to protect and enhance the quality of the Nation's air

resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b).[2] They represented "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution," *Union Elec. Co. v. EPA*, 427 U.S. 246, 256-57 (1976), and followed a series of prior congressional efforts to encourage states to address that problem. *See Train v. NRDC*, 421 U.S. 60, 63-67 (1975).[3] Still, Congress preserved a central role for the states, establishing an intricate "partnership," under which the states could, if they chose, assume responsibility for implementing some of the Act's central regulatory programs.[4]

Subject to qualifications required by its notorious complexity, the Act adopts two basic approaches to structuring the federal-state partnership. *See* John P. Dwyer, *The Practice of Federalism Under the Clean Air*

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[2] The 1970 amendments, Pub. L. No. 91-604, 84 Stat. 1676, amended the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. The Act was again comprehensively amended in 1977, Pub. L. No. 95-95, 91 Stat. 685, and 1990, Pub. L. No. 101-549, 104 Stat. 2399. It is codified at 42 U.S.C. §§ 7401 *et seq.*

[3] *See, e.g.*, Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 Hous. L. Rev. 679, 684-702 (1999); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1155-57 (1995). On pre-1970 state regulation, *see* David P. Currie, *Air Pollution: Federal Law and Analysis*, §§ 1.08-1.12 (rev. ed. 1991); 1 Senate Comm. on Public Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970*, at 123-25 (Comm. Print 1974). On other rationales for federal regulation, *see* Richard B. Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of Federal Environmental Policy*, 86 Yale L. J. 1196, 1212-13 (1977), and Daniel Esty, *Revitalizing Environmental Federalism*, 95 Mich. L. Rev. 570 (1996).

[4] *General Motors Corp. v. EPA*, 496 U.S. 530, 532 (1990); *see* 42 U.S.C. § 7401(a)(3) (CAA provision dating from 1963 Act stating that "air pollution prevention * * * and air pollution control at its source is the primary responsibility of States and local governments").

Act, 54 Md. L. Rev. 1183, 1193-96 (1995). One is to establish federal goals for air quality while leaving states discretion to select measures necessary to meet the federal air quality goals. This approach is exemplified in the 1970 amendments' provision for national ambient air quality standards ("NAAQS"). 42 U.S.C. §§ 7408, 7409(a). States were to prepare and submit for EPA review and approval state implementation plans ("SIPs") providing for implementation, maintenance, and enforcement of the NAAQS, 42 U.S.C. § 7410, but state plans could include "whatever mix of emissions limitations" on existing pollution sources the state chose to meet the national standard. *Train*, 421 U.S. at 79.

Congress has typically taken a markedly different approach, based on "direct federal regulation," for new or expanded stationary sources. Currie, *Air Pollution*, § 3.01 at 3-2. For such sources, the Act imposes technology-based national standards to "force" the development of new control technologies, *see Union Elec.*, 427 U.S. at 457, and to constrain states' incentives to under-protect air quality to attract business and to shunt pollution onto other jurisdictions. *See*, *infra*, pp. 18-20. For example, the New Source Performance Standards ("NSPS"), introduced in 1970, require new and modified sources to meet technology-based standards set by EPA based on "the best system of emission reduction * * * adequately demonstrated." 42 U.S.C. § 7411(a)(1).

As developed below, this fundamental distinction between state discretion to set and allocate controls for existing sources and federal technology-based requirements for new or modified sources is reflected in the prevention of significant deterioration program.

The Prevention of Significant Deterioration Program. In *Sierra Club v. Ruckelshaus*, the court held that the Act's purpose to "protect and enhance" the nation's air quality,

42 U.S.C. § 7401(b)(1), prohibited EPA or states from allowing substantial increases in air pollution levels in relatively "clean" areas meeting the NAAQS.[5] In response, in 1974 EPA promulgated an administrative "prevention of significant deterioration" ("PSD") program under which new or expanded pollution sources would be required to adopt the "best available control technology."[6]

Congress enacted a statutory PSD program as part of the comprehensive 1977 amendments. 42 U.S.C. §§ 7470-7479. To ensure that states did not allow air pollution levels in "clean air" areas to degrade toward "bare compliance" with the NAAQS, the program "requires that each new or expanded 'major emitting facility' in 'clean air areas' use the 'best available control technology' (BACT) for minimizing additional air pollution [and] also establish[es] 'increments' that limit the cumulative increase in pollution levels over the 'baseline concentrations' in clean air areas." Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling versus Site-Shifting*, 74 Iowa L. Rev. 1, 3 (1988) (citations omitted). The PSD requirements are supplemental to other obligations under the Act; to comply with its PSD obligations, a facility must also comply with the NAAQS, NSPS, and other statutory standards. 42 U.S.C. § 7475(a)(3).

The PSD provisions establish a pre-construction permitting requirement for new or modified "major emitting facilities." 42 U.S.C. § 7475. *See* 42 U.S.C. § 7479(1); 40 C.F.R. § 51.166(b)(4). "There are in practice two major requirements" for obtaining a permit: installing BACT and demonstrating that applicable PSD increments will not be

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[5] 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

[6] *See* 1 William H. Rodgers, *Environmental Law: Air and Water*, § 3.21 (1986).

exceeded. Oren, *PSD*, 74 Iowa L. Rev. at 22-23. The increments are maximum allowable increases and concentrations of designated pollutants that serve to "limit the cumulative increase" in pollutant levels (measured against baseline concentrations specific to each clean air area). 42 U.S.C. §§ 7473, 7479(4). *See* 40 C.F.R. § 51.166(b), (c).[7]

In addition, each major emitting facility to be constructed or modified is "subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." 42 U.S.C. § 7475(a)(4). Section 169(3) defines BACT as:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * * .

42 U.S.C. § 7479(3). EPA regulations and Alaska's federally-approved PSD program reflect the statutory definition. *See* 40 C.F.R. § 51.166(b)(12), § 52.21(b)(12); 18 A.A.C. 50.900(9) (1991). EPA uses the "top-down" approach to determining BACT, as described in the New Source Review Workshop Manual and many permitting decisions. *See In re General Motors, Inc.*, PSD Appeal No. 01-30, 2002

[7] Increments depend on an area's classification. *See* 42 U.S.C. §§ 7472-74. Class I areas, subject to the most stringent increments, include most National Parks and other special federal lands; Class II areas include most "clean air" areas; and Class III areas are permitted the greatest degree of degradation. States may reclassify areas subject to certain limitations.

WL 373982, slip op. at 9 (E.A.B. 2002) (citing decisions).[8] Under that approach, the applicant must identify all "available" technologies; eliminate those shown to be technically infeasible; then select the technology most effective at reducing emissions, unless proven energy, environmental, or economic impacts require its rejection in favor of the next most effective technology. *Id.* at 6 & n.4; *see* J.A. 175-77.[9]

The PSD permitting program may be administered by states with EPA-approved PSD programs or by EPA itself. 42 U.S.C. §§ 7410(a)(2)(C), 7410(c), 7471. *See* 40 C.F.R. §§ 51.166, 52.21, 52.96(a) (Alaska program approval). In either case, PSD permit applications must be reviewed and analyzed "in accordance with regulations promulgated by the Administrator," and there must be a public hearing. 42 U.S.C. §§ 7475(a)(2), 7475(e)(3). Like the NSPS and other CAA requirements for new and modified sources, PSD is a component of EPA's "New Source Review" ("NSR") program. *See* 40 C.F.R. §§ 51.165, 51.166, 52.21, 52.24, Pt. 51 App. S; 67 Fed. Reg. 80,186, 80,187-88 (Dec. 31, 2002). As explained below, as part of the PSD program

[8] The Manual is 1990 draft guidance from the EPA's Office of Air Quality Planning and Standards. As petitioner's staff noted, EPA has "published numerous policy memoranda and guidance documents to assist applicants and permitting authorities in using the top-down approach." J.A. 175.

[9] EPA's Environmental Appeals Board has stated that "a strict application of the top-down methodology" is not mandatory for state permitting authorities, but that in evaluating the "rationality and defensibility of BACT determinations by permitting authorities," EPA has "required an analysis that reflects a level of detail in the BACT analysis comparable to the methodology in the NSR Manual." *In re General Motors*, slip op. at 9 (citing decisions); *see also In re Steel Dynamics*, PSD Appeal Nos. 99-4, 99-5, 2000 WL 833062, slip op. at 25-26 (E.A.B. June 22, 2000) ("top-down analysis is not a mandatory methodology, but it is frequently used by permitting authorities to ensure that a defensible BACT determination, involving consideration of all requisite statutory and regulatory criteria, is reached").

enacted in 1977, Congress gave EPA express authority to take enforcement action to prevent the construction of a facility in violation of the Act. *See* Section 167, 42 U.S.C. § 7477.[10]

The 1990 Amendments. The 1990 amendments expanded the scope of Section 113(a)(5), which now provides: "Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources," the Administrator may issue an order prohibiting the construction or modification of a source, issue an administrative penalty order, or commence a civil action. 42 U.S.C. § 7413(a)(5).[11] Because the PSD program (42 U.S.C. §§ 7470-7492) is part of the designated "chapter" (Chapter 85, 42 U.S.C. §§ 7401-7671(q)), Section 113(a)(5) gives EPA authority to enforce any "requirement" of the PSD provisions.[12]

[10] Congress broadened Section 167 in 1990 to cover facility modifications. *See* 104 Stat. 2399, 2684.

[11] Before 1990, Section 113(a)(5) was limited to violations in nonattainment areas. 42 U.S.C. § 7413(a)(5) (1988).

[12] The 1990 amendments added Title V of the Act, 42 U.S.C. §§ 7661a-7661f, under which each "major source" of air pollutants must obtain an "operating permit" consolidating all its CAA obligations. *See* 42 U.S.C. §§ 7661a, 7661c(a); 40 C.F.R. § 70.1(b); 40 C.F.R. Pt. 70 (EPA Title V regulations); *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996). States administering Title V must submit proposed permits to EPA for review. 42 U.S.C. § 7661d(a); 40 C.F.R. § 70.8(a). If EPA objects within 45 days that the permit "is not in compliance with the requirements of [the CAA]," the permitting authority "may not issue the permit." 42 U.S.C. § 7661d(b)(1)-(2), (c); 40 C.F.R. § 70.8(c). Unless the deficiency is cured, EPA "shall issue or deny the permit in accordance with the requirements" of the CAA. 42 U.S.C. § 7661d(c). EPA may "terminate, modify, or revoke and reissue" operating permits. 42 U.S.C. § 7661d(e). Cominco applied for a Title V permit for the Red Dog Mine on December 8, 1997; petitioner has not yet acted on the application. *See* Alaska Dep't of Environmental Conservation, *available at* www.state.ak.us/dec/dawq/aqm/sched.xls (permit review status for permit application No. 290) (last visited June 27, 2003).

SUMMARY OF ARGUMENT

The Act's language, structure and history demonstrate that EPA may enforce the substance of the BACT requirement when a state has failed to do so. Petitioner wrongly portrays BACT as a kind of legislative afterthought that gives states "sole discretion" (Br. 27) to allocate pollution-control burdens, subject only to procedural requirements and ambient air quality standards like the PSD increments. In fact, however, BACT is an essential feature of the PSD program, intended to provide pollution controls beyond those necessary to comply with the PSD increments and other air quality standards. *See* 42 U.S.C. § 7475(a). Congress intended BACT to "force" the adoption of new control technologies, to counter states' tendency to under-protect air quality in order to attract or keep industry, and to preserve air quality in adjacent states and on special federal lands such as National Parks. *See* 42 U.S.C. § 7470.

In Sections 113(a)(5) and 167, Congress gave EPA authority to take enforcement action when the agency concludes that a proposed major emitting facility fails to meet any "requirement" of the PSD program. A facility's obligation to install BACT is such a requirement, and the legislative history of the 1977 amendments pointedly confirms EPA's enforcement authority.

EPA has long acknowledged that state permitting authorities have discretion in determining BACT, and has disclaimed any power to "second-guess" reasonable state judgments. But that discretion is not a license to ignore the statutory text or BACT's intended function in the PSD program. Petitioner's account of BACT as hopelessly standardless (Br. 24) is incompatible with the statutory text and BACT's technology-forcing function. Its argument that EPA's remedy for an arbitrary BACT determination is to seek state review would, without statutory warrant, create an anomalous system for enforcement of a federal statute.

In issuing Cominco's PSD permit, petitioner acted inconsistently with its own determinations that Selective

Catalytic Reduction ("SCR") technology is far more protective of the environment than the Low NOx technology petitioner ultimately endorsed, and that SCR is technically feasible and economically affordable. Petitioner based its decision on vague and undocumented concerns about "socioeconomic impacts" and "world competitiveness," reasoning that would eviscerate the BACT requirement. EPA acted within its express statutory powers in taking enforcement action.

ARGUMENT

I. EPA HAS STATUTORY AUTHORITY TO ENFORCE THE SUBSTANCE OF THE BACT REQUIREMENT[13]

A. The Plain Language of the Act's Enforcement Provisions Authorizes EPA to Enforce Any PSD "Requirement."

Statutory construction "begins" with the statutory text and "ends there as well" when the text yields a "clear answer." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432,

[13] The court below (Pet. App. 18a) concluded that EPA's orders represented "final action" reviewable under 42 U.S.C. § 7607(b)(1). A panel in another circuit has since held EPA compliance orders non-final and unreviewable, reasoning that the CAA cloaks such orders with serious legal consequences without giving regulated entities a meaningful opportunity to challenge their factual or legal basis. *Tennessee Valley Auth. v. Whitman*, ___ F.3d ___, 2003 WL 21452521 (11th Cir. June 24, 2003). In our view, the *TVA* decision is faultily reasoned. The Act does not support the panel's pivotal conclusion (*id.* at **17-18) that Congress sought to preclude parties from disputing the factual or legal foundation of EPA compliance orders in judicial enforcement proceedings. Here, by comparison, the Ninth Circuit construed the statute to require review of the underlying merits of the EPA compliance orders and directed the Agency to submit a complete administrative record for review by the court of appeals, withdraw its orders, or file an enforcement action in district court. Pet. App. 22a.

438 (1999). A statute "is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

The Act provides a "clear answer" to the question of EPA enforcement authority presented here. The orders EPA issued to Cominco on February 8 and March 7, 2000, J.A. 253, 260, 264, and the December 10, 1999 finding and order issued to petitioner, Pet. App. 26a, 36a, were authorized under Section 167, 42 U.S.C. § 7477, which allows EPA to enforce by administrative order or otherwise "the requirements" of the Act's PSD provisions. Section 167 provides:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of [part C, codifying the PSD program].

EPA likewise had express statutory authorization for these actions under Section 113(a)(5) of the Act. Section 113(a)(5) authorizes EPA to take enforcement action when it finds that a state "is not acting in compliance with any requirement or prohibition of [the CAA] relating to the construction of new sources[.]" 42 U.S.C. § 7413(a)(5). The enforcement power delegated to EPA includes issuing an order "prohibiting the construction or modification of any major stationary source." *Id.* On April 25, 2000, EPA, however, withdrew the order portion of the December 10 document issued to petitioner, because petitioner had already (and in defiance of EPA's action) issued Cominco a PSD permit. Pet. App. 19a; J.A. 300.

B. BACT Is Integral to the Act and Is a Binding National "Requirement."

Confronted with statutory language plainly authorizing EPA to enforce PSD "requirements" and requiring new and modified major emitting sources to install BACT,

petitioner is forced to argue that the "only 'BACT requirement' pertinent here" is the requirement that a permit "contain a BACT limitation devised by the state after considering the applicable factors." Pet. Br. 22. Petitioner thus maintains that as long as the state reaches *some* BACT determination and complies with the PSD permitting procedures, and as long as the facility will not exceed the governing ambient air quality standards (such as the PSD increments and NAAQS), the state has necessarily complied with the Act. Pet. Br. 22-23. As for the substance of the BACT requirement, petitioner's position is: *De gustibus non est disputandem*. The BACT determination, petitioner asserts, is fraught with "case-specific policy judgments" that make it as subjective and standardless as "asking different people to pick the 'best' car." Pet. Br. 24.

All this bears little resemblance to that requirement as established by Congress. Reading petitioner's account, one might forget that the Act "requires" BACT in order "to minimize emissions." S. Rep. No. 95-127 at 29 (1977). It does not subject facilities to "whatever-technology-the-state-adopts-after-holding-a-hearing-and-discussing-the-statutory-factors." *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (noting "essentially procedural" nature of National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*). Instead, it subjects facilities to "the best available control technology," 42 U.S.C. § 7475(a)(4). The text rebuts petitioner's claim (Br. 25-26) that the BACT standard is one of uncabined subjectivity: BACT is "an emission limitation based on the *maximum degree of reduction* of each pollutant * * * which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is *achievable* for such facility[.]" 42 U.S.C. § 7479(3) (emphases added). The strong, normative terms "maximum" and "achievable" – also used in the 1977 amendments' standards for new sources in nonattainment areas, 42 U.S.C. §§ 7501(3), 7503(a)(2) ("lowest achievable emission rate"), and the Act's technology-based standard for hazardous emissions (42 U.S.C. § 7412(d)(2) ("maximum

degree of reduction * * * achievable") – are inconsistent with petitioner's reading of BACT as inviting the freedom and even caprice of consumers making automotive purchases.

When the 95th Congress wanted to restrict EPA's authority to enforcing "procedural" requirements, it knew how to say so. *See* 42 U.S.C. § 7474(b)(2) (EPA may reject state's redesignation of PSD area classification if "such redesignation does not meet the procedural requirements of this section"). No such limitation, however, is found in Sections 113(a) or 167.[14] This is unsurprising: Given BACT's centrality to the PSD program, it would have been odd for Congress to have empowered EPA to block construction due to a faulty hearing but not an arbitrary choice of control technology.

Petitioner's understanding (Br. 22) of the BACT "requirement" as purely procedural is not shared by the courts, administrative agencies, or Congress. The leading decision refers to "BACT requirements" and to BACT as "[o]ne of the principal substantive prerequisites to obtaining a PSD permit," *Alabama Power Co. v. Costle*, 636 F.2d 323, 358, 407 (D.C. Cir. 1980); EPA's and petitioner's regulations refer to "BACT requirements," *e.g.*, 40 C.F.R. §§ 51.166(s)(4); 52.21(v)(4); 18 A.A.C. 50.375, and the 1977 Senate Report refers to BACT (S. Rep. No. 95-127 at 12) as a "national requirement" and confirms that EPA may "go to court to stop a permit for activities which * * * did not comply with the requirements of this section, including the use of best available control technology." BACT is a

[14] The Title V provisions authorizing EPA to block proposed operating permits, 42 U.S.C. § 7661d(b), similarly fail to restrict EPA to "procedural" violations of the PSD provisions, indicating that Congress in 1990 did not accept petitioner's view that the substance of BACT determinations lies within the "sole discretion" of the state.

substantive standard that states consenting to implement the PSD program must apply, not just consider. *Cf. FERC v. Mississippi*, 456 U.S. 742, 764 (1982). It is no less a "requirement" than the Act's other technology-forcing obligations, like "lowest achievable emission rate," 42 U.S.C. § 7503(a)(2), or "best system of emission reduction * * * adequately demonstrated," *id.* § 7411(a).

While making liberal use of the 1977 legislative history for the undisputed point that states with approved PSD programs determine BACT (Pet. Br. 18, 30-33), petitioner ignores passages that expressly confirm EPA's oversight and enforcement authority. The same 1977 Senate Report that rates a "passim" in petitioner's brief explains that:

> *The [EPA] Administrator's role is one of monitoring state actions. States have authority to issue construction permits to new major emitting facilities in clean air areas. The Administrator thus could go to court to stop a permit for activities which would exceed the increments of pollution or which otherwise did not comply with the requirements of this section [setting forth the PSD program], including the use of best available control technology.* But the Administrator could not and should not attempt to burden this section with unnecessary regulations and guidelines.
>
> The Administrator should tell the States the basis for his review. When asked, [EPA] should become involved at an early date in particularly difficult permit applications so that States and localities will know of any potential differences.

S. Rep. No. 95-127 at 12 (emphasis added).[15]

[15] *See also* S. Rep. No. 95-127 at 36 (Administrator may take "measures that would be necessary to prevent the issuance of a permit

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Despite statutory text and legislative history confirming EPA's enforcement authority, petitioner insists the PSD program is part of an "overall approach" (Br. 26) in the Act in which EPA sets "national standards to achieve and maintain clean air," and states "decide how to allocate the available increments among competing sources." Pet. Br. 17. Similarly, petitioner argues (Br. 27), the PSD increments are analogous to the NAAQS and the BACT determination resembles states' authority under the 1970 amendments to select "whatever" controls they choose (*Train*, 421 U.S. at 79) for existing sources as long as the federal air quality standards are satisfied.

For new and modified facilities, the Act's "overall approach" has never been as petitioner describes. To the contrary, the 1970 amendments not only established the nationwide NSPS (*supra*, p. 4), but also called for technology-forcing emissions limitations for hazardous air pollutants (as amended, 42 U.S.C. § 7412), automobiles (42 U.S.C. §§ 7521-7544), and aircraft (42 U.S.C. § 7571). In 1977, Congress added new national, technology-based standards for new and modified stationary sources in both "clean air" areas, *supra*, pp. 5-7, and nonattainment areas, 42 U.S.C. § 7502(c).[16] A structure combining technology-forcing federal

for a new source if it did not comply with the [PSD] requirements"); H.R. Rep. No. 95-564 at 153 (1977) ("The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit."). As Senator Muskie put it: "Once a State adopts a permit process in compliance with this provision, [EPA's] role is to seek injunctive relief or other judicial relief to assure compliance with the law." 123 Cong. Rec. S9169 (daily ed. June 8, 1977).

[16] Petitioner is again off the mark when it suggests (Br. 26-27) that the early NAAQS/SIP model represents some universal template for federal-state relations under the federal environmental statutes. Federal-state relationships vary enormously both between statutes and within particular statutory schemes on basic matters like standard-setting,

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standards and optional state implementation backed by EPA enforcement authority – rather than open-ended state discretion – has been the Act's "overall approach" for new and modified sources.

Mischaracterizing BACT as (at best) a mechanism for states to meet the PSD increments, petitioner disregards the intended function of the BACT requirement and its centrality to the PSD program. The 1977 amendments establish a "*national requirement that each new major facility to be located in a clean air area install the best available control technology.*" S. Rep. No. 95-127 at 12 (emphasis added). Facilities' obligation to install BACT is separate and distinct from their obligation to comply with the PSD increments: Each major emitting source that complies with the increments must *also* implement BACT. *See* 42 U.S.C. § 7475(a).[17] Because pollution controls "ultimately determine the emissions from a source, an accurate BACT analysis is essential to a successful PSD review." National Comm'n on Air Quality ("NCAQ"), *To Breathe Clean Air* at 157 (1981).[18] BACT was specifically intended to produce pollution control beyond that necessary to meet the PSD increments: As explained in the Senate Report, BACT would compel the "rapid adoption of improvements in technology as new sources are built," while the increments would operate as a "second level of protection" and a "second stimulant to improved controls" on air pollution. S. Rep. No. 95-127 at 18.[19] Petitioner's treatment of BACT goes far toward reading it out of the statute.

An independent BACT requirement is essential to maintaining the increments themselves. Congress adopted BACT in part to "minimize the consumption of PSD increments and thus expand the affected area's potential for future economic growth." NCAQ, *To Breathe Clean Air* at 157. "If the allocation were left entirely to the states, they might give the whole pie to the first comers and create irresistible pressures to relax the ambient limits themselves." Currie, *Air Pollution*, § 7.08 at 7-21. *See also* 122 Cong. Rec. S3905 (March 22, 1976) (BACT would "prevent the first source moving into an area from using up the full increment") (quoting article by Sen. Domenici); S. Rep. No. 95-127 at 31.[20]

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program approval and revocation, permitting authority, enforcement, and preemption. *See Symposium: Environmental Federalism*, 54 Md. L. Rev. 1141 (1995).

[17] Reviewing a state's BACT determination, EPA Administrator Reilly rejected a similar argument, explaining that the Act "separates issues of overall air quality from issues of technology" and that, in contrast to the requirements that facilities comply with the increments, BACT is "principally a technology-forcing measure that is intended to foster rapid adoption of improvements in control technology." *In re Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11, 1989 WL 266361 (E.A.B. 1989). "Both of these provisions," the Administrator explained, "must be satisfied by an applicant seeking a PSD permit, and compliance with one provision does not relieve or lessen an applicant's burden of complying fully with the other." *Id.*

[18] The NCAQ was established by 1977 amendments to undertake an independent analysis of air pollution programs. 91 Stat. 685, 785 (1977).

[19] By prescribing the category-wide NSPS as a minimum for BACT, 42 U.S.C. § 7479(3), the statutory PSD program ended EPA's prior practice of equating BACT with NSPS. *See* Craig N. Oren, *Clearing the Air*, 9 Va. Envtl. L.J. 45, 75 (1989).

[20] Indeed, the NCAQ found that "a program requiring best available control technology alone (without the increment system) would result in emissions growth equivalent to that obtained through the current program with increments, if best available control technology determinations were made in a manner consistent with its current definition." NCAQ, *To Breathe Clean Air* at 23. *See* Rodgers, *Environmental Law*, at

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Congress intended BACT, as "[p]ossibly the most important" of the 1977 Act's many technology-fostering measures, to spur "improvements in the technology of pollution control."[21] Petitioner's treatment of BACT as a "subjective" appeal to states' "sole discretion" ignores the technology-forcing philosophy that was "fundamental" to the adoption of BACT and congressional efforts throughout the 1977 amendments "to accelerate technological innovation in the control of air pollution." S. Rep. No. 95-127 at 10. A scheme that gave states unfettered discretion to adopt pollution control technologies for particular sources would not perform this vital "forcing" function. *See Union Elec.*, 427 U.S. at 257. Had BACT been left to states' "sole discretion" (Pet. Br. 27), it would have done little. Before 1977, states already had ample authority under their police powers and the CAA's savings clause (42 U.S.C. § 7416) to impose more stringent emissions limitations on new and modified sources in clean air areas. A federally unenforceable invitation to consider various factors would have provided states no new incentive to force development of new control technologies.

Petitioner's approach is also at odds with Congress's intent through the PSD program to insure that "economic

375-76 (NCAQ study suggests that "BACT is the cake and the increments the mere frosting").

[21] S. Rep. No. 95-127 at 17-18. *See* 42 U.S.C. §§ 7501(3), 7503(a)(2) ("lowest achievable emission rate" for new sources in nonattainment areas), 7502(c)(1) ("reasonably available control technology" for existing sources in nonattainment areas), 7491(g)(2) (requiring "best available retrofit technology" for existing sources impairing visibility in national parks and certain other clean air areas); *In re Columbia Gulf Transmission Co.*, 1989 WL 266361 at *3 (discussing BACT's "technology-forcing" role). The Senate Report noted that the technology-forcing provisions of the 1970 amendments had brought about "positive changes" by stimulating "more effective, less-costly systems to control air pollution." S. Rep. No. 95-127 at 17-18.

growth will occur in a manner consistent with the preservation of existing clean air resources," 42 U.S.C. § 7470(3), and "to prevent competition for industry to be waged among States on the basis of air quality." H.R. Rep. No. 95-294 at 141 (1977). *See Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 282 (1981). "Without national guidelines for the prevention of significant deterioration," legislators feared, firms would "play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls." H.R. Rep. No. 95-294 at 134. The PSD program was intended to forestall a "flight of industry – and jobs" from dirty-air to relatively clean air areas, and "to protect States choosing to retain clean air resources from 'environmental blackmail' by industrial sources that may attempt to play one State off another with threats to locate or relocate plants in States with weaker environmental requirements." *Id.* at 133, 140. Leaving the states, as petitioner urges, with "sole discretion" to select their own version of the "best" technology would reinforce the interjurisdictional pressures Congress was trying to restrain. State permitting authorities would scarcely take an ambitious view of what level of control technology is "achievable" if they knew that competing states had "sole discretion" to choose their own versions of BACT. Indeed, the National League of Cities and the National League of Counties supported the 1977 PSD legislation precisely because of "the competitive struggle that exists among States and localities for new industry." H.R. Rep. No. 95-294 at 133, 135, 152, 202.

Finally, giving states "sole discretion" over the substance of control technology choices is in tension with Congress's intent through the PSD program to protect federal parklands, wilderness areas, and other areas of "special national or regional *** value," 42 U.S.C. § 7470(2), as well as the air resources of neighboring states, *id.* § 7470(4). *See* Craig N. Oren, *The Protection of Parklands from Air Pollution: A Look at Current Policy*, 13 Harv. Envtl. L. Rev. 313, 321-27 (1989). Congress had

time-tested reasons to provide for a federal "backup" role regarding state BACT determinations: States have limited incentives to protect resources belonging to the nation as a whole or to other states. *See Missouri v. Holland*, 252 U.S. 416, 435 (1920); *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906); *McCulloch v. Maryland*, 17 U.S. 316, 431-35 (1819). *See also* 42 U.S.C. § 7474(b) (federal land manager's role in state reclassification decisions). By denying federal enforcement authority, petitioner again attributes to Congress a "conspicuous[ ] fail[ure]" to "provide EPA with the authority needed to achieve the statutory goals." *E.I. Du Pont De Nemours & Co. v. Train*, 430 U.S. 112, 133 (1977).[22]

C. The "Case-by-Case" Nature of Permitting Authorities' BACT Determinations Does Not Defeat EPA's Enforcement Authority.

Despite the plain statutory language establishing EPA's authority to enforce PSD requirements, petitioner attempts to create an exemption to the text by arguing (Br. 21-22, 28-29) that the "case-by-case" nature of the BACT determination shows that Congress intended to commit the substance of BACT entirely to states. But, in fact, the facility-specific BACT inquiry was intended to produce more effective pollution control and accommodate local differences in raw materials or plant configuration that might make a technology "unavailable" in a particular area. Case-by-case BACT evaluation ensures that permits

[22] The importance of a federal oversight role is particularly apt in this case: The Red Dog Mine is located in an otherwise pristine and scenic region of Alaska, five miles from the Noatak National Preserve, which protects a spectacular mountain-ringed river basin containing an intact Arctic ecosystem. According to the National Park Service, which is responsible for managing the Preserve, vegetation in the area is likely to be sensitive to nitrogen deposition. *See* J.A. 228, 284.

incorporate "the latest technological developments," in contrast to "the stagnation that occurs when everyone works against a single national standard for a new source." S. Rep. No. 95-127 at 18. Whereas the rigid NSPS standard "must take into account what is best for the weakest performer in a category," case-by-case identification of BACT "can take advantage of the control potential of the particular proposed source." Oren, *PSD*, 74 Iowa L. Rev. at 33. It was not intended to give states "sole discretion" to subordinate air quality to other priorities.

BACT determinations are guided by administrable factors – "maximum" pollution reductions, consideration of energy, environmental, and economic impacts, and specified abatement techniques. 42 U.S.C. § 7479(3). The case-by-case application of these factors resembles other determinations that agencies and courts regularly confront; it may not always point to a "single, objectively 'correct' BACT determination" (Pet. Br. 23), but it does rule out a range of *unreasonable* determinations that if adopted present appropriate occasions for EPA action. Certainly nothing about BACT makes it so unsuited to EPA review as to require the manufacture of an implied exception to EPA's enforcement authority.

Similarly groundless is petitioner's effort (Br. 25) to elicit from Congress's reference to the "permitting authority" – usually the state, but not infrequently EPA itself – an implied intent to preclude EPA enforcement. Had Congress wished to foreclose EPA oversight, it readily could have so provided. But Sections 113(a)(5) and 167 empower EPA to enforce the "requirements" of the PSD provisions, and neither contains any limitation for BACT or for state-issued permits. To be sure, Congress intended to allow states with EPA-approved PSD programs to

determine BACT for individual sources, a function previously performed by EPA alone (S. Rep. No. 95-127 at 8).[22] But it does not follow that Congress thereby intended to exempt states from EPA enforcement. Sections 113(a)(5) and 167 show that it did not. *See also* S. Rep. No. 95-127 at 36 ("Once the State submits an adequate [PSD program], [EPA's] role is restricted to assuring compliance with the law.").

D. EPA Has Understood its Limited Role in Reviewing State PSD Determinations, and Disavowed any Power to "Second-Guess" Reasonable State BACT Determinations.

Petitioner is off the mark when it accuses EPA of asserting a power to "second-guess" petitioner's BACT determination. *See* Pet. Br. i, 21, 35. EPA has long acknowledged that its enforcement authority respecting BACT is circumscribed. Memorandum from Michael S. Alushin, Associate Enforcement Counsel for Air (July 15, 1988) (J.A. 272-73) (recognizing that BACT determination involves "the exercise of judgment," but stating that EPA may pursue enforcement action if determination is "not based on a reasonable analysis"). EPA has disavowed any power to "second-guess" state BACT determinations, and has repeatedly acknowledged its limited oversight and

[22] EPA has not contended that Sections 113(a) and 167 "require EPA approval" (Pet. Br. 25) of state BACT determinations. Instead of *requiring* EPA to approve BACT determinations, Sections 113(a)(5) and 167 *authorize* EPA to act in those rare instances when a state has acted arbitrarily. *See, e.g.*, 57 Fed. Reg. 28,093 (June 24, 1992) ("EPA acknowledges that states have the primary role in administering and enforcing the various components of the PSD program. States have been largely successful in this effort, and EPA's involvement in interpretative and enforcement issues is limited to only a small number of cases.").

enforcement role.[24] It adhered to that limited role here, explaining why petitioner's BACT determination was "arbitrary" and contrary to petitioner's own findings. J.A. 149-50. EPA's limited but vital role in enforcing BACT is consistent with a scheme that "places primary responsibilities and authority with the States, backed by the Federal Government." S. Rep. No. 95-127 at 29.

Nor is there merit to petitioner's warning that EPA could upset state BACT determinations "months, even years, after a permit has been issued." Pet. Br. 35. EPA's exercise of its enforcement powers is subject to judicial review. *See* 42 U.S.C. §§ 7607(b)(1), 7413(b). EPA could not engage in the conduct hypothesized by petitioner while the federal courts sit to review EPA's actions. *See Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting). *Cf. United States v. AM General Corp.*, 34 F.3d 472, 475 (7th Cir. 1994) (upholding dismissal of enforcement action where EPA did not act until well after facility received PSD permit and completed plant modifications).

[24] As it noted in approving Virginia's PSD program, "EPA may not intrude upon the significant discretion granted to states under new source review programs, and will not 'second guess' state decisions." 63 Fed. Reg. 13,795, 13,796 (March 23, 1998). EPA inquires whether the state's decision rested "on reasonable grounds properly supported on the record, described in enforceable terms, and consistent with all applicable requirements." *Id. See also, e.g.*, 58 Fed. Reg. 15,422, 15,426 (March 23, 1993).

E. Relegating EPA to an Appeal Before a State Agency or Court Is Inconsistent With the Statute and Would Create an Ungainly Procedure for EPA Oversight and Enforcement.

There is nothing unduly "awkward[ ]" (Pet. Br. 19) about Congress's decision to subject states' decisions in implementing the PSD program to EPA's oversight and enforcement authority, to be followed by an opportunity for federal judicial review of any final EPA actions in particular instances. Such policy considerations are no defense against plain statutory language. *See* 42 U.S.C. §§ 7413(a)(5), 7477; Rodgers, *Environmental Law*, § 3.36 at 523 ("For better or worse, this forum that places EPA in an appellate position reviewing 'major' state permits is the principal source of recorded law on compliance orders.")

Nor is there anything unusual about authorizing EPA (subject to judicial review) to oversee state implementation of the BACT requirement. Similar federal oversight roles abound under the CAA and other federal statutes. EPA reviews SIPs, and federal courts of appeals then review EPA's actions, *see* 42 U.S.C. § 7410(a), (k); 42 U.S.C. § 7607(b)(1); *Union Elec.*, 427 U.S. at 252, even though those state plans involve discretion-laden policy judgments. Section 209(b)(1) of the CAA provides that the Administrator shall deny a state's request for a waiver of the Act's preemption of state auto emissions standards if EPA concludes that the state's determination that conditions for a waiver exist is "arbitrary and capricious," 42 U.S.C. § 7543(b)(1). *See Motor and Equipment Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979). Under the Clean Water Act, federal courts review EPA's decisions to approve or set aside state-promulgated water quality standards. *See* 33 U.S.C. § 1313(c); *American Wildlands v. Browner*, 260 F.3d 1192, 1196 (10th Cir. 2001).

Indeed, it is petitioner's alternative enforcement scheme that diverges from the norm under federal environmental laws. Petitioner (Br. 23) acknowledges that EPA

itself can take "appropriate action" under Sections 113(a)(5) and 167 when a state has failed to issue *any* BACT determination; granted a permit that allows violations of NSPS or ambient standards; denied a hearing; or failed to conduct the statutorily required analysis of the proposed source. After a discreet interval of pages, however, petitioner asserts (Br. 36) that, if EPA disputes the *substance* of a state BACT determination, its only recourse is to file a state administrative appeal and seek review in state court. Petitioner does not explain whether the state court then would apply federal law, some unspecified state law, or whether (as petitioner elsewhere suggests, Pet. Br. 24-25) the BACT definition simply has no legally binding substance (rendering *any* appeal a fool's errand). In any event, petitioner complains (Br. 19, 36, 37) that EPA improperly "bypassed" or "short-circuited" this putative review scheme.

Congress has not traditionally been in the practice of subjecting federal agencies charged with enforcing federal law to exclusive state jurisdiction. *Cf. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.6, 385 n.10 (1999).[25] Among other defects, petitioner's approach would require EPA to litigate in two fora at once – federal courts for procedural violations, and state courts for claims of substantively unlawful misapplications of the BACT standard. Such a scheme would hardly conduce to "certainty

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[25] We are aware of no comparable regime in any federal environmental statute. The McCarran Amendment, 43 U.S.C. § 666, contains an express waiver of federal immunity and rests on considerations unique to general water rights adjudications. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). State water quality certifications under Section 401 of the Clean Water Act are reviewable only in state court, but Section 401 expressly incorporates state law, 33 U.S.C. § 1341(d). *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). BACT determinations, by contrast, rest exclusively on federal law.

and finality" or "cl[arity]" (Pet. Br. 35, 36) in the permitting process. The statute refutes petitioner's contention that the same Congress committed the core of the BACT decision – the choice of control technology and explanation for that choice – to the unreviewable discretion of state agencies and courts.[26]

II. EPA PROPERLY DETERMINED THAT THE PERMIT ISSUED BY PETITIONER IS ARBITRARY AND INCONSISTENT WITH THE ACT

The question presented is whether EPA has the "authority" to take enforcement action with respect to the Red Dog PSD permit. Pet. *i*. As demonstrated, the answer to that question is affirmative. The Court need not reach the further issue whether EPA properly exercised its authority on the facts here. If the Court does address that issue, however, petitioner's own reasoning demonstrates that its BACT determination for MG-17 violated the statute. Under the top-down approach petitioner purported to apply, *see* J.A. 62, 109, 176, petitioner repeatedly determined, and still does not dispute, that SCR is between two and three times as effective as "Low NOx" technology at reducing NOx emissions. *See* J.A. 188-89 (SCR achieves 80-90% reductions in emissions); J.A. 191 (30% for Low NOx); *see also* J.A. 65, 110, 181. Tracking the statutory factors, 42 U.S.C. § 7479(3), top-down analysis proceeds to consider whether the top-ranked technology is

[26] 42 U.S.C. §§ 7413(a)(5), 7477. *See also* S. Rep. No. 95-127 at 12. Petitioner also points (Br. 38) to language ensuring "interested persons including representatives of the Administrator" an opportunity to participate in PSD permit hearings. 42 U.S.C. § 7475(a)(2). This language guarantees EPA a chance to participate in state hearings, thereby encouraging early mediation of any disagreements with the state. *See* S. Rep. No. 95-127 at 12. It does not, however, purport to limit the enforcement authorities described in Sections 113(a)(5) and 167.

technically and economically feasible. Petitioner established that SCR was technically feasible and never deviated from this finding. *See* J.A. 65, 80, 181.[27] On May 4, 1999, petitioner found that SCR was also economically feasible, with a control cost effectiveness of about $1600 per ton, well within the established range for NOx BACT determinations. J.A. 83.

At Cominco's urging, however, petitioner reversed course in its September 1, 1999 report, this time deeming SCR's costs "excessive." J.A. 116. Petitioner, however, never significantly altered its estimate that SCR cost-effectiveness was about $2000 per ton nor disputed that this value fell within the established range for NOx BACT. J.A. 113, 204. Cominco never presented any evidence that the capital cost of SCR would seriously impair the profitability of the mine, and refused to provide this information when EPA requested it.[28] In its final report, petitioner stated that "[a]nother perhaps better way to determine BACT is for the applicant to present detailed financial information showing its effect on the operation. However,

[27] In its September 28, 1999 letter to petitioner, EPA informed petitioner that Wartsila, the manufacturer of Cominco's generators, had provided it with a list of 33 facilities that had installed SCR on more than 50 of their engines. J.A. 124.

[28] It is not self-evident that installing SCR would adversely affect Cominco's "competitiveness," let alone the regional economy. Cominco's 1999 annual report lists its revenues as $1.645 billion, and its operating profits from zinc operations as $234 million. *See* 1999 Annual Report, *available at* http://www.teckcominco.com/investors/reports/clt/clt-99-ar.pdf (last visited June 26, 2003). The report described the Red Dog Mine as the company's "flagship operation," holding "approximately 23% of the world's zinc mine reserves," the "largest and richest ever discovered," and "key" to Cominco's "strategic efforts to become the world's lowest cost and most profitable zinc producer." *Id.* at p. 2. Teck-Cominco's annual report lists its 2002 revenues as $2.187 billion. *See* 2002 Annual Report, *available at* http://www.teckcominco.com/investors/reports/ar2002/tc-2002-highlights.pdf (last visited June 26, 2003).

the applicant did not present this information. Therefore, no judgment can be made as to the impact of a $2.1 million control cost on the operation, profitability, and competitiveness of the Red Dog Mine." J.A. 116; *see also* J.A. 207.

To explain its about-face, petitioner stated that Cominco's mine provides jobs in a depressed region, and that the ongoing expansion ensured that it "will continue to influence and benefit the residents and the economy of this region." J.A. 208.[29] Petitioner explained that it had "chosen to consider the direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts for the foremost consideration to judge economic impacts." J.A. 208. In this opaque language lurk rationales that would, if tolerated, eviscerate the PSD program. First, petitioner's reliance on competitiveness impacts and job losses was baseless given its statement a page earlier that "*no judgment can be made* as to the impact of a $2.1 million control cost on the operation, profitability, and

[29] Petitioner (Br. 13) also reprises an argument it expressly rejected in the permitting proceedings, namely, that Cominco's agreement to install Low NOx on existing generators MG 1, 2, 3, and 5, meant that the net emissions of the project as permitted were lower than if Cominco had installed SCR on MG 17 only. As EPA explained (J.A. 96-97) and as petitioner acknowledged (J.A. 111-12, 199), the CAA and implementing regulations do not allow for such an approach. "Netting" can be used to exempt modified sources from PSD review requirements if there will be no significant project-wide increase in emissions. *See* 40 C.F.R. § 51.166(b)(3), 40 C.F.R. § 52.21(b)(2)(i). Cominco, however, was proposing an expansion that would result in a net increase in NOx emissions of 1100 tons per year. J.A. 169. (The BACT threshold for NOx emissions is 40 tons per year.) Furthermore, Cominco had an independent legal imperative to install Low NOx controls on units 1,2,3 and 5. Once Cominco sought to have the operating caps removed from these units, leading to pollution increases, it had to use low-NOx technology to keep pollution from these units below previously permitted levels. J.A. 139. Had Cominco declined to do so, these units would have been independently subject to BACT. J.A. 129, 139.

competitiveness of the Red Dog Mine." J.A. 207. More fundamentally, petitioner's stated grounds for decision are contrary to the statute's focus on what is "achievable" and BACT's intended function as a meaningful technology-forcing standard to counter interstate competitive pressures to lower air quality requirements. *Supra*, p.19.

If states could reject effective and "available" technologies based on undocumented claims about "boost[ing]" the local economy and "world competitiveness" (J.A. 207-208), the BACT requirement would mean little. Surely *most* "major emitting facilities" – which by definition emit hundreds of tons of pollutants per year, *see* 42 U.S.C. § 7479(1), and under the instant permit, almost 4000 tons per year of NOx, J.A. 156-57 – are subject to "world competition." By relying on the massive Red Dog facility's "socioeconomic impacts," petitioner flouted Congress' intent in the PSD program "to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air." *Alabama Power,* 636 F.2d at 353. The Act cannot be read to excuse facilities from installing effective control technology by invoking competitive conditions that are ubiquitous in a market economy.

Petitioner changed course based on a desire to "support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region" and to reward Cominco for its "unique and continuing impact on the economic diversity of this region[.]" J.A. 208. Whatever the precise contours of permitting authorities' discretion, concerns like these cannot be lawful rationales to reject otherwise more effective and available control technologies. States then would have unbridled discretion to adopt dramatically less effective control technologies based on a bare desire to reward local businesses. Petitioner's solicitude for a local company at the expense of air quality illustrates the kinds of local pressures that led Congress to

impose BACT as a "national requirement," *supra*, p. 16, and stands as an example of why the EPA enforcement authority expressly provided for in Sections 113(a) and 167 of the Act is essential in maintaining the integrity of the PSD program.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

STATE OF ALASKA,
DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIVE VILLAGE OF KIVALINA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Native Village of Kivalina is a federally recognized Alaska Native Tribe, providing services to, and protecting the interests of, the Inupiat Eskimo peoples of Kivalina.[1] The Native Village of Kivalina is one of the "Indian tribal entities . . . recognized as having a special relationship with the United States" and thereby is eligible for Bureau of Indian Affairs Services. Indian Tribal Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 47 Fed. Reg. 53,130-31, 53,134 (1982); *see also* 25 U.S.C. §§ 479-479a-1; Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328, 46,332 (2002). It also has been recognized as an "aboriginal group" for the purposes of eligibility for grants from the U.S. Department of Justice's Law Enforcement Assistance Administration. Determination of Eligible Alaska Native Villages, 45 Fed. Reg. 46,581, 46,582 (1980).

Kivalina is located in northwest Alaska on the coast of the Chukchi Sea, roughly 20 miles northwest of the port for Teck Cominco Alaska Incorporated's ("Teck Cominco") Red Dog mine. U.S. Environmental Protection Agency and Department of the Interior, *Final Environmental Impact Statement, Red Dog Mine Project Northwest Alaska*, EPA-10-AK-Wulik-NPDES-884 (1984) ("*FEIS*"), at IV-51. Nearly all of Kivalina's approximately 380 residents are Inupiat Eskimo. State of Alaska Department of Community and Economic Development,

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation of submission of the brief. S. Ct. Rule 37.6. This brief is filed with the consent of the parties; copies of the consents have been filed with the Clerk. S. Ct. Rule 37.3.

Alaska Community Database, *at* http://www.dced. state.ak.us/cbd/commdb/CF_BLOCK.cfm (last visited June 24, 2003); Maniilaq Association, *Kivalina*, *at* http://www.maniilaq.org/kivalina.html. (last visited June 24, 2003).

In proceedings before the Ninth Circuit Court of Appeals, the Native Village of Kivalina filed an amicus curiae letter supporting the position of the respondents United States Environmental Protection Agency ("EPA") *et al.* It continues to support EPA's position, and urges affirmance of the decision of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The Native Village of Kivalina supports the EPA's exercise of authority under the Clean Air Act to prevent the State of Alaska's Department of Environmental Conservation ("ADEC") from permitting Teck Cominco to install a generator at the Red Dog mine that has inadequate pollution control technology. The Native Village of Kivalina supports the actions of the EPA because federal oversight over Alaska's permitting authority is essential to preserving the clean environment upon which Kivalina's villagers depend for their subsistence foods and culture. ADEC's determination that "low" nitrogen oxides ("NOx") is the "best available control technology" ("BACT") for the proposed new generator disregards its environmental responsibilities under the Clean Air Act and will mean that more pollution enters Kivalina's environment.

ARGUMENT

ADEC's approval of low NOx technology allows the company to use a less effective pollution control. The record shows that in reaching its permit determination, ADEC based its decision on some unquantified calculus

of economic benefit to the region and to Teck Cominco and disregarded environmental considerations that are very important to the Native Village of Kivalina.

In northwest Alaska, subsistence hunting, fishing and other food gathering activities comprise most of the local non-cash economy. Kivalina is a traditional Inupiat Eskimo village where subsistence activities, including whaling, provide most food sources. *Id.* From time immemorial, Inupiat Eskimo in the Kivalina area have thrived by hunting caribou, moose, whale, walrus, and seal, by harvesting fish from the Chukchi Sea and local rivers, and by gathering other foodstuffs that grow on the area's tundra, such as the leafy plant sour dock and different kinds of plentiful berries, and these activities provide the source of most of the food in Kivalina. *Id.*; *FEIS*, IV-54-61. Degradation of the natural environment upon which the villagers and their food resources depend will spell the end of the villagers' subsistence culture.

The people of Kivalina live with airborne pollution from the mine. Two years ago the U.S. Department of the Interior's National Park Service announced the results of a study of pollution along the 24-mile length of the mine's haul road located in Cape Krusenstern National Monument. National Park Service, U.S. Department of the Interior, *Heavy Metals in Mosses and Soils on Six Transects Along the Red Dog Mine Haul Road*, NPS/AR/NRTR-2001/38, (May 2001) *available at* http://www.nps.gov/akso/reddog/RedDogrpt.pdf (last visited June 24, 2003). The study found that levels of lead, zinc, cadmium and other metals were well in excess of regulatory standards, with some cadmium levels exceeding "concentrations in samples from heavily polluted regions in Eastern Europe." *Id.* at 21. EPA has listed Red Dog mine for the last eight quarters (July 2001-June 2003) as a High Priority Violator, or HPV, under the Clean Air Act because of violations of the

mine's air quality control permit. U.S. Environmental Protection Agency, *Enforcement & Compliance History Online (ECHO)*, *at* http://www.epa.gov/echo/search_by_permit.html (permit number AK0038652) (last visited June 24, 2003).

If it is not equipped Selective Catalytic Reduction ("SCR") technology, emissions of nitrogen oxides from Teck Cominco's new generator will be substantially higher than if it is equipped with SCR. Theses nitrogen oxide emissions could affect vegetation used by caribou and moose in Cape Krusenstern National Monument and Noatak National Preserve. Thousands of animals from the Western Arctic Caribou Herd graze on the tundra in the vicinity of the mine, and airborne toxins accumulating in the lungs of these animals and coating the vegetation they graze are in turn ingested by the people of Kivalina. Airborne toxins accumulating on berries and other vegetation could be directly consumed by villagers. ADEC ignored these considerations when, as described by the State in its briefing before the Ninth Circuit Court of Appeals, it "gave particular weight to the" fact of "the remote location of the mine and absence of a population likely to be affected by NOx emissions[.]" 9th Cir. Petitioners' Combined Opening Brief, at 10.

Operations of the Red Dog mine also have a very real impact on the quality of Kivalina's water. The Wulik River flows by Kivalina and it is the source of the village's drinking water. State of Alaska Department of Community and Economic Development, *Alaska Community Database*, *at* http://www.dced.state.ak.us/cbd/commdb/CF_BLOCK.cfm (last visited June 24, 2003). The Wulik River also is the village's primary subsistence fishery. *FEIS*, IV-55-61. Kivalina is forced to live with the Red Dog mine's periodic illegal discharges of toxic mining byproducts, including heavy metals and other chemicals, into the upper tributaries of the Wulik River.

In 2001 and 2002 the mine had significant effluent violations of its National Pollution Discharge Elimination System Permit under the Clean Water Act, and EPA lists the Red Dog mine as in "significant non-compliance" with the Act. U.S. EPA, *Enforcement & Compliance History Online (ECHO)*, *at* http://www.epa.gov/echo/ search_by_permit.html (permit number AK0038652) (last visited June 24, 2003).

Economic benefits from the mine have been overstated by the NANA Regional Corporation, Inc. ("NANA"), but especially in comparison to the northwest Alaska Natives' reliance on a subsistence way of life. Brief of Amicus Curiae NANA, at 5. According to information from the Alaska Industrial Development and Export Authority ("AIDEA"), an agency of the State of Alaska, of the 522 permanent, full-time jobs and 59 temporary jobs at the mine in the summer of 2002, just 292 were staffed by NANA shareholders. AIDEA, *Project Fact Sheet: DeLong Mountain Regional Transportation System (DMTS) Road and Port serving mining district that includes the Red Dog Mine* (May 20, 2003), *available at* http://www.aidea.org/PDF%20files/DMTSFactSheet.pdf (last visited June 24, 2003). NANA and Teck Cominco maintain a "fly-in camp" at the mine, which enables non-shareholders to work at the mine and port after commuting from cities where they live and spend their paychecks. Many paychecks from the mine's operation never enter that part of the local economy that is cash-based.

More importantly, the cash benefits from the mine must always be weighed against its environmental costs. To the extent pollution from the mine degrades the environment, the mine depresses the local subsistence-based economy. Use of the most effective pollution control at the mine will help preserve the local environment and will enable the Inupiat Eskimo of Kivalina to survive as subsistence food gatherers long after the mine is played out.

Although NANA emphasizes the economic gap the Red Dog mine would leave if it were forced to close, there is nothing in the record indicating that the mine cannot be operated profitably while using SCR technology on one of its generators. Brief of Amicus Curiae NANA, at 5. In fact, ADEC recently issued a Public Notice of a draft permit that would allow Teck Cominco to install and use SCR on the new generator at the mine. *See* Alaska Department of Environmental Conservation, *Public Notice (Expired)*, *at* http://www.state.ak.us/dec/dawq/aqm/calendar.htm (last visited June 24, 2003).

Moreover, in light of the magnitude of the Red Dog mine and the substantial size of Teck Cominco itself, there was no need for ADEC to be concerned about impacting Teck Cominco's operations. Teck Cominco's annual report for 1999 lists the company's revenues in that year as $1.645 billion, and its operating profits from zinc operations in that year as $234 million. Cominco, *1999 Annual Report*, *available at* http://www.teckcominco.com/investors/reports/clt/clt-99-ar.pdf (last visited June 24, 2003). Although the report does not review how much of Teck Cominco's revenues and profits were attributable to the Red Dog Mine, the report does state that

> [Teck] Cominco's flagship operation, the Red Dog Mine in Alaska, holds approximately 23% of the world's zinc mine reserves. These reserves are the largest and richest ever discovered and play a key role in our strategic efforts to become the world's lowest cost and most profitable zinc producer. More than just a single deposit, Red Dog is proving to be a zinc 'district' that is unrivaled in the world today.

Id. at 2. Teck-Cominco's annual reports lists its revenues as $2.187 billion in 2002 and $2.379 billion in 2001 and the operating profits from its worldwide zinc mining

operations as $50 million in 2002, and $87 million in 2001. *See* Cominco, *2002 Annual Report*, *available at* http://www.teckcominco.com/investors/reports/ar2002/tc-2002-highlights.pdf (last visited June 24, 2003).

The federal oversight provisions of the Clean Air Act, meant to prevent the actions of state and local authorities from weakening national goals for environmental protection, are particularly important to Native American Tribes like the Native Village of Kivalina. This Court recognized long ago that federal government must undertake a trust duty to protect tribal interests because states often do not keep the interest of the tribes at the forefront. *United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

Here the State of Alaska has interests that conflict with an objective view of its responsibilities under the Clean Air Act and with Kivalina's interests. Through AIDEA, Alaska has invested nearly $267 million dollars in the construction of the mine's haul road and port facility. AIDEA, *Project Fact Sheet*, *available at* http://www.aidea.org/PDF%20files/DMTSFactSheet.pdf. As reimbursement, Teck Cominco pays Alaska a toll for the use of these facilities. *Id.* In January 2000, AIDEA underwrote part of a feasibility study by the U.S. Army Corps of Engineers to develop a plan to greatly expand the port, a project that AIDEA also would substantially underwrite. *See* Notice of Intent to Prepare an Environmental Impact Statement for the DeLong Mountain Terminal Navigation Improvements, 65 Fed. Reg. 12976 (2000); AIDEA, *Project Fact Sheet*, *available at* http://www.aidea.org/PDF%20files/DMTSFactSheet.pdf (indicating AIDEA is the local sponsor for this expansion proposal). These financial interests have led ADEC to subjugate the environmental concerns of the Native Village of Kivalina to the economic concerns of Alaska,

NANA, and Teck Cominco, and to shunt aside the BACT requirement of the Clean Air Act.

NANA's supervision of environmental concerns around the mine also has not provided an adequate safeguard for Native Village of Kivalina. Because of NANA's for-profit mandate, it must be concerned foremost with the success of its business partner, Teck Cominco. This perspective has weakened NANA's ability to act as a vigilant watchdog for the environmental concerns of Kivalina.

CONCLUSION

Because Kivalina villagers live in a subsistence-based economy, they depend on the environmental vitality of the land. ADEC's refusal to require adequate pollution controls at the Red Dog mine threatens that vitality. The Native Village of Kivalina therefore supports EPA's exercise of authority under Sections 113(a)(5) and 167 of the Clean Air Act in overseeing Alaska's implementation of the Act's permitting requirements and urges affirmance of the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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IN THE
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET. AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NORTHWEST ENVIRONMENTAL DEFENSE CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Northwest Environmental Defense Center (NEDC or Amicus) is an independent, non-profit organization working to protect the environment and natural resources of the Pacific Northwest.[1] NEDC's work includes providing legal support to individuals and grassroots organizations with environmental concerns, and engaging in litigation independently or in conjunction with other environmental organizations to ensure that the Nation's environmental laws are properly enforced.

As part of our mission, NEDC seeks to maintain or restore healthy air, water, and ecosystems on behalf of our members who live primarily in the Pacific Northwest, but who also reside in other parts of the country. We believe that the Environmental Protection Agency (EPA or Administrator) plays a vital role in enforcing the Nation's environmental laws, thus moving us closer to achieving our goal of a healthy environment.

SUMMARY OF ARGUMENT

The enforcement authority given to EPA under the Clean Air Act (CAA, or Act) allows EPA to oversee best achievable control technology (BACT) determinations made by the States under the Prevention of Significant Deterioration (PSD) program. Using the principles of statutory interpretation in the opinion below, the Ninth Circuit held that EPA had correctly exercised this authority

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[1] Counsel for the parties have consented to the filing of this amicus curiae brief, and the letters of consent are being filed with this brief. Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for a party has authored this brief in whole or in part. No person or entity other than amicus or its members has made a monetary contribution to the preparation and submission of this brief.

in its issuance of an order preventing new construction at Cominco's Red Dog Mine. EPA issued its order in spite of the fact that the Alaska Department of Environmental Conservation (ADEC, State, or Alaska) had issued a permit for the construction to go forward under the State's PSD program. EPA objected to the issuance of the permit on the basis that the State had not offered a reasoned justification for its determination that Low NOx was BACT for the facility rather than Selective Catalytic Reduction (SCR).

The statutory provision which gives the State the authority to make a BACT determination does not operate in isolation, but must be read in conjunction with the rest of the Act. In looking at the CAA as a whole, and particularly at the PSD provisions, a great deal of authority is given to EPA to implement guidelines under the PSD program and to ensure that the guidelines are properly carried out. Various provisions of the Act allow for EPA's input at the individual permit level. As the BACT determination is a major factor in the implementation of the PSD program, it would be anomalous for EPA to have so much PSD authority, but have no right to oversee a State's BACT analysis.

If EPA has erred at all, it is perhaps in not having promulgated its guidelines in the form of a final rule. If this is the case, then the remedy is for EPA to undertake formal rulemaking.

The principles of cooperative federalism outline the proper roles of the States and EPA in implementing the regulatory scheme of the CAA. A State, if it chooses, has the primary responsibility to implement the PSD program within its borders. EPA's role is to ensure that the State's implementation of the program is in accord with the policies and purposes mandated by the Act.

Although the State may be in a better position to evaluate the unique factors involved in a particular permit decision, the State is also subject to conflicts of interest which may cloud its judgment. EPA's distance from the situation can serve to make it more objective in its technological and scientific determinations. Furthermore, EPA's central position allows it to serve as a clearinghouse for the huge amounts of information that must be assembled and disseminated.

Past performance of the States under the Act led Congress to give EPA increasing authority in the successive amendments to the Act. In view of the continuing revelations about the health effects of the pollutants regulated by the CAA, the evolving science and technology, and the Nation's failure to achieve the goals and purposes of the Act, a strong oversight role for EPA is essential.

ARGUMENT

I. THE TEXT AND STRUCTURE OF THE CLEAN AIR ACT GIVE THE EPA AUTHORITY TO ISSUE ORDERS PROHIBITING CONSTRUCTION OF A FACILITY WHICH DOES NOT CONFORM TO THE REQUIREMENTS OF THE PSD PROGRAM.

A. *The plain language of the Clean Air Act gives EPA authority to oversee the PSD program.*

Section 113(a)(5) of the CAA gives EPA authority to enforce the provisions of the PSD program. 42 U.S.C. § 7413(a)(5). Section 167 of the Act goes even further and mandates that the Administrator take *some* measures to prevent construction or modification of a major emitting

facility which does not meet the requirements of the PSD program.[2] 42 U.S.C. § 7477.

The present dispute revolves around whether this authority extends to a determination of BACT for a particular facility, and, if so, in what manner the authority should be exercised. In light of the ambiguity in the CAA provisions, EPA, the agency charged with administering the Act, is entitled to deference in its interpretation of the statute. *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

B. *EPA's oversight authority extends to a BACT determination.*

The Ninth Circuit, in the opinion below, held that EPA had the ultimate authority in resolving a question of State compliance with BACT requirements, based on the plain language and legislative history of the Act. Pet. App. 1a, *et.seq.*

The statute provides roles for both the State and EPA in a determination of what constitutes BACT for a facility. At first glance, the CAA might appear to give all authority for determining BACT to the State in its definition of the term. 42 U.S.C. § 7479(3). That definition specifies that BACT is an emission limitation which the "permitting authority, on a case-by-case basis ... determines is achievable for such facility ...." *Id.* However, the canons of statutory construction and this Court's opinions dictate that statutory

[2] Petitioner and Respondent have ably and amply analyzed these provisions and the relevant caselaw. In keeping with Rule 37.1, Amicus attempts to avoid completely or state in concise form those arguments already addressed by the parties. Amicus apologizes for any inadvertent duplication of arguments or analysis.

language is not viewed in isolation. The Court has summarized its prior holdings on this subject as follows:

> The words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal citations and quotations omitted). It is true, as Petitioner claims, that the Act clearly gives the permitting authority primary responsibility for determining what constitutes BACT at a particular facility for each regulated pollutant. 42 U.S.C. § 7475(a)(4). But primary responsibility does not mean sole responsibility, or even ultimate responsibility.

An analogy may serve to illustrate how the State can be deemed to have the primary responsibility, while EPA retains the ultimate oversight authority. The situation is similar to a public corporation run by a Chief Executive Officer (CEO) and overseen by a Board of Directors. The CEO has the primary responsibility for day to day operations and reporting to the Board. The Board sets policy, and makes and oversees the major business and financial decisions. As long as there are no problems, the Board does not get involved in the day to day operations. However, if the CEO begins to operate contrary to corporate policy, thereby overstepping his or her boundaries, the Board will step in to take control and put things back on track.

Certain provisions of the Act give authority to the State, while others give authority to EPA, thus defining the roles of each. Under the CAA, the permitting authority, usually a State, but sometimes the federal government, a local agency, or a tribe, serves in the role of the CEO. The EPA fills the

role of the Board. As long as the permitting authority is operating in harmony with the Act and its implementing regulations, then EPA has no cause to object. However, when the permitting authority contravenes one of the Act's provisions, EPA may, indeed must, step in to correct the error. According to the statute: "The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part …." 42 U.S.C. § 7477. (*See also* discussion of cooperative federalism, *infra*.)

In this case, the permitting authority is the State of ADEC, because Alaska's State Implementation Plan (SIP) contains a PSD permit program, approved by EPA in 1983. 40 C.F.R. § 52.96(a). Therefore, ADEC does indeed have primary responsibility for the implementation of the PSD program in the State.

On the other hand, certain sections of the Act indicate that EPA, in addition to setting broad guidelines and standards, has the responsibility for ensuring that individual permit decisions are in keeping with PSD program regulations and policies. Other sections of the Act indicate that EPA also has the authority to promulgate regulations governing the determination of BACT.

While Congress, in Section 163, described in great detail the increments and ceilings governing sulfur oxide and particulate matter emissions, Section 166 only gives broad direction to EPA's regulation of the remaining criteria pollutants, including nitrogen oxide (NOx), the pollutant at issue here. 42 U.S.C. §§ 7473 & 7476. For instance, Section 166 directs the Administrator to provide specific measures for carrying out the goals and purposes of Sections

101 and 160 of the Act. 42 U.S.C. § 7476(d). One of these purposes is to provide technical and financial assistance to State and local governments in the execution of their air pollution control programs. 42 U.S.C. § 7401(b)(3). Another purpose is to assure that PSD permit decisions are made only after "careful evaluation of all the consequences of such a decision …." 42 U.S.C. § 7470(5). Without the ability to oversee a State's BACT determination, EPA would be hard-pressed to carry out this congressional mandate. Concerning the promulgation of regulations governing these remaining criteria pollutants (including NOx), EPA is directed to provide, among other things, "a framework for stimulating improved control technology …." 42 U.S.C. § 7476(c). EPA's "top-down" approach for determining BACT would appear to fulfill these mandates of Congress.

Finally, Section 165 further signals EPA's involvement at the individual permit level. It provides that no facility may be constructed unless "the proposed permit has been subject to a review in accordance with this section, [and] the required analysis has been conducted in accordance with regulations promulgated by the Administrator …." 42 U.S.C. § 7475(a)(2). This provision explicitly gives the Administrator the authority to promulgate regulations governing the analysis of the preconstruction process under the PSD program. This same section indicates that the BACT determination is to be part of that analysis. 42 U.S.C. § 7475(a)(4). Section 165 also mandates: "Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such a State and provide notice to the Administrator of every action related to the consideration of such a permit." 42 U.S.C. § 7475(d)(1). Unless Congress expected the EPA to actively oversee the program at the individual permit level, it would make no sense to require the State to submit such a

thorough and timely account of the permit process to the EPA.

Alaska's interpretation of the statute would relegate EPA to the role of an archivist. Alaska suggests that, other than permits that violate the increments, EPA's objection is proper only when the State fails to include any BACT limitation in a PSD permit or fails to issue a permit at all. Pet. Brief 25. Accordingly, EPA's role in overseeing BACT and other permit determinations would simply be that of a clerk, checking to make sure all the blanks were filled in, but not being concerned about the contents.

C. *EPA correctly exercised its oversight authority in determining that ADEC's BACT analysis was deficient.*

The issuance of an administrative order preventing construction or modification of a major emitting facility is in keeping with the enforcement options allowed by the Act. This is the method EPA chose to correct the problem it perceived in Cominco's permit. The provisions governing enforcement by EPA specifically mention an administrative compliance order as a means of halting construction or modification of a facility that does not comply with the requirements of the PSD program. 42 U.S.C. §§ 7413(a)(5)(A) & 7477.

Alaska's interpretation strips the BACT provision of its significance. Nothing in the language or structure of the statute limits EPA's oversight authority only to those permits that violate the allowed increments. Pet. Brief 27. Nor do the terms or scheme of the Act allow the permitting authority to substitute an alternate technology regime for BACT, even if the alternate regime results in lower emissions. Pet. Brief 42. If Congress had intended either result, there would have

been no need for a BACT provision. To limit EPA's objections to permits which violate the allowed increments, all Congress would have needed to mandate is that no permit may violate the increments. Similarly, instead of the BACT prerequisite for PSD construction, the statute would call for the control technology or combination of controls which results in the lowest overall emissions for the facility. But Congress included in the PSD program a requirement that permits issued under that part force the facility to use the "best achievable control technology." 42 U.S.C. 7475(a)(1)&(4). Alaska's reading of the statute renders the BACT provision superfluous, violating the dictate that a statute be interpreted so as to fit all parts into "an harmonious whole." (See *Brown & Williamson*, supra.)

D. *The remedy for any shortcoming in EPA's exercise of authority is to remand the case to the Ninth Circuit.*

Despite the fact that EPA's interpretation of BACT protocol has not been issued as a final rule, it is still entitled to deference. As long as it is reasonable, EPA's longstanding and consistent interpretation of the CAA is entitled to deference under the *Chevron* doctrine. *Chevron*, 467 U.S. at 842-843. Additionally, the Court has found the agency entitled to deference when it is attempting to reconcile competing policies or when the regulatory scheme is technical and complex. *Id.* at 865. This case involves the very same complex regulatory scheme (CAA) and competing policies (reducing air pollution versus economic growth) that were at issue in *Chevron*. Logically, EPA should be accorded the same deference in this case as it was in *Chevron*.

However, the Court has recently indicated that the failure of Congress to delegate general authority to the

agency or the manner in which an agency exercises its statutory authority may affect the measure of deference to which an agency rule is entitled. *United States v. Mead Corporation*, 533 U.S. 218, 237 (2001). More specifically, the Court has indicated that interpretations contained in opinion letters, policy statements, agency manuals, and enforcement guidelines do not warrant the *Chevron*-style deference that would be accorded to formal adjudication or notice-and-comment rulemaking. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Even if these interpretations do not warrant *Chevron*-style deference, they are still entitled to deference to the extent they are persuasive. *See generally, Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The instances in which EPA has issued guidelines for a BACT determination seem to fall on both sides of the line. Regarding EPA's interpretation of BACT's objective standards, a Legal Opinion by EPA's Office of General Counsel states that: "In the case of a decision applying best available control technology (BACT) under Section 165(a)(4) for PSD, if a State has met all procedural norms, considered all available control technologies, and given a reasoned justification of the basis for its decision, EPA has no grounds on which to challenge a final substantive State decision that does not violate such objective standards." Pet App. at 12a. Another source of EPA guidelines, delineating the "top-down" method, is EPA's *New Source Review Workshop Manual* (1990). Pet App. 13a. Interestingly, the "top-down" approach has been the subject of a proposed settlement (*See* 56 Fed. Reg. 34202 (1991)), a proposed rule (*See* 61 Fed. Reg. 38250 (1996)), and several Unified Agendas (*See* e.g., 64 Fed. Reg. 64023 (1999), 66 Fed. Reg. 61286 (2001)), but has not yet been published as a final rule. Finally, the "top-down" approach has been addressed in numerous policy memorandums [sic], guidance documents,

court cases, and administrative appeal decisions. J.A. at 175-176.

To give the ultimate authority concerning the validity of a BACT decision to the permitting authority would contravene the intent of Congress. As discussed above, Congress has repeatedly indicated its intent that EPA should have authority over the PSD program. Ultimately, it is the BACT determination which drives the PSD engine. Without the ability to oversee a BACT determination, EPA's PSD enforcement authority amounts to very little. Therefore, if the Court finds that EPA's exercise of its PSD authority thus far is not entitled to *Chevron*-style or even *Skidmore*-style deference, the case should be remanded with an order that EPA undergo notice-and-comment rulemaking to formalize its BACT approach.

As ADEC has not objected to EPA's "top-down" approach, and indeed purported to follow that approach in the Cominco permit decision, a remand would not affect the outcome of the case below. ADEC only questioned EPA's authority to oversee ADEC's permitting decision. The Ninth Circuit correctly held that EPA has the authority to decide whether a State has complied with the BACT requirements of the Act and the State's SIP, and concluded that EPA's exercise of that authority in this case was not arbitrary and capricious.

II. THE POLICIES OF FEDERALISM AND PRACTICAL EXPERIENCE SUPPORT EPA'S CLEAN AIR ACT OVERSIGHT AUTHORITY.

A. *The Clean Air Act can only work with strong EPA oversight; any attempt to curtail that oversight would only reverse the current progress towards attaining the goals of the Act.*

Many federal statutory schemes are based on th e system of cooperative federalism. *New York v. United St ites*, 505 U.S. 144, 167 (1992). Under this system, Congress may use a variety of methods to encourage the States to reg ulate in a particular manner. *Id.* One method is to attach con ditions to the receipt of federal funds. *Id.* A second metho d, where Congress has authority to regulate private activity, s to offer States a choice between implementing the program themselves, according to minimum federal standa ds, or of having a federally-run program implemented in the State. *Id.* The CAA is one example of a statutory scheme uti izing the second method.

In a State which decides to implement its own program, the scheme amounts to a shared power or partn ership of sorts. As in any partnership, a certain amount of tension is bound to exist as to who is going to be the domina t partner. It would be virtually impossible to have an equal pa rtnership; when a disagreement arises, somebody is going o have to exercise the final authority.

Reasonable arguments can be made on beha f of each partner as to why they should fulfill the dominant role. On the States' side of the debate are the ideas that the State is in a better position to respond to unique local cond tions and can allocate resources more efficiently. D uglas R. Williams, *Cooperative Federalism and the Clean Air Act: a Defense of Minimum Federal Standards*, 20 St. Louis U. Pub. L. Rev. 67, 70 (2001). Likewise, the idea of forcing States to pay for regulations imposed on them by the federal government (unfunded mandates), and find ings that Americans increasingly favor regulation at the State and local level, argue for the State fulfilling the dom inant role. Jonathan H. Adler, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6

Geo. Mason L. Rev. 573, 580-582 (1998). Factors supporting federal dominance are the inclination of pollution to cross state boundaries, leading to disputes between States, and the benefits to be gained from centralizing the information collection and dissemination necessary with such complex scientific and technical issues. Williams, *supra* at 97-106. Also favoring federal regulation are the race-to-the-bottom theory in which States lower environmental standards in an attempt to attract business, and the idea that States will not regulate to the standards desired by the majority of State residents because of the greater influence of the regulated entities on State authorities. *Id.* at 107-112.

Studies and polls come to opposite conclusions as to who is the preferred regulator in the popular arena, States or the EPA. A 1996 national poll showed the majority of Americans favor state and local environmental regulation. Adler, *supra* at 582. Conversely, another author indicates that a "supermajority" of Americans wants to preserve and even expand federal environmental regulatory authority. Joshua D. Sarnoff, *The Continuing Imperative (but only from a National Perspective) for Federal Environmental Protection*, 7 Duke Envtl. L. & Pol'y F. 225, 319 (1997).

Two elements, at least, are definite with regard to CAA implementation. First, over the past three decades, there has been substantial resistance on the part of the States, the regulated community, *and* the EPA to expending the resources necessary to implement the standards of the Clean Air Act. *Id.* at 307 (emphasis added). Second, the history of the CAA and its amendments shows a progressive increase in the enforcement power of the federal government.

The legislative history of the Act demonstrates that Congress considered the positions and interests of both the

States and EPA in implementing the program, and divided authority between the two. The Ninth Circuit opinion gives an overview of the amendments and legislative history of the Act that delegate increasing authority to the federal government. Pet. App. 9a-10a. The 1970 amendments were intended in part "to assure that the requirements of the Act would be met if the States failed to adopt, implement, or enforce the necessary measures." H.R. Rep. No. 95-294, at 326 (1977).[3] Congress recognized the mechanics of the race-to-the-bottom theory and the pressure that was exerted on States by industry's threat to locate to more permissive States. *Id.* at 136-37.[4] Congress provided for federal oversight to protect States that wanted to maintain clean air. *Id.* As Petitioner points out, the BACT decision was recognized to be a key determination, and the committee placed that responsibility with the State, giving it broad flexibility to interpret the provision. S. Rep. No. 95-127, at 31 (1977). Also significant, however, was Congress' view of the Administrator's role in monitoring State actions: "The Administrator thus could go to court to stop a permit for activities which would exceed increments of pollution or which otherwise did not comply with the requirements of [PSD], *including use of best available control technology*." *Id.* at 12 (emphasis added).

In spite of the increased federal enforcement authority, the States' costs of noncompliance with federal mandates still are not likely to be very high. Williams, *supra* at 88. A 1988 study by the General Accounting office indicated that State and local officials were reluctant to implement measures which might have inhibited economic development or altered life-styles. *Id.* at 87. Because of the lackluster progress under the 1977 amendments of the Act,

[3] The Ninth Circuit attributes this to S. Rep. 95-127, at 326 (1977).
[4] This is also attributed to S. Rep. 95-127, at 136-7.

Congress implemented a "milestones program" designed to evaluate progress towards emissions reduction targets in nonattainment areas. *Id.* at 88-89. Under this program, the States were supposed to demonstrate their progress to EPA. *Id.* However, the innovative mechanisms of the 1990 amendments have not been implemented or have been ineffective, and the States have not been held accountable for these shortcomings by EPA. *Id.* at 90.

Further impetus for continued or enhanced EPA oversight derives from the fact that statistical data show an inability to meet health standards under current criteria. Recent studies indicate that the original standard for ozone (of which NOx is a precursor) is not sufficient to protect public health. *Id.* at 68. All in all, though air quality has improved since the inception of the Act, there still remains a long way to go in achieving the goal of enhanced air quality. *Id.* at 67. If anything, EPA oversight of the CAA needs to be increased, not lessened.

B. *If it is true that the country is in need of increased energy capability, that fact only argues more strongly for EPA oversight of the Act.*

Although the Center for Energy and Economic Development (CEED) (Petitioner's Amicus) argues that the anticipated increased demand for energy should dictate that EPA stand aside in order to avert an energy crisis, in reality the increased demand also increases the need for EPA oversight. Logically, the 25% increase in energy generating capacity that CEED deems necessary would result in a corresponding increase in air pollution. As stated above, the previous standard for ozone was inadequate to meet public health requirements. The new standard promulgated by EPA in 1997, although an improvement, may not be sufficient to protect public heal h and also is far from being implemented.

See generally Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001), *American Trucking Ass'ns, Inc. v U.S.E.P.A.*, 283 F.3d 355, (D.C. Cir 2002), and Williams *supra* at 68. Furthermore, recent studies indicate that chronic exposure even to low levels of pollutants, including NOx, may have serious health effects, especially in children. *See* Testimony of Dr. Barry L. Johnson before the Senate Environment and Public Works Committee, March 12, 2002 <http://www.senate.gov/~epw/107th/Johnson_031202.htm>. *See also* Jefferson H. Dickey, M.D., *No Room to Breathe: Health Effects of Criteria Air Pollutants from Power Plants 2002* <http://psr.igc.org/nrtb-new-rpt1.htm>. Caution dictates that everything possible should be done to minimize the increase in pollutants due to increased energy generating capacity so that the corresponding health impacts are minimized. EPA is in the best position to ensure that the construction of these new generating facilities is performed in a manner to reduce these emissions.

C. *Past experience, public health, and public interest indicate that federal oversight authority is necessary if the goals and purposes of the Act are to be respected.*

Industry, although capable of great innovation, has a tendency to resist change, even change which is ultimately economically beneficial. One illustration of this is the phase-out of ozone depleting substances under the Montreal Protocol. At first, producers of ozone depleting substances (ODSs), were extremely resistant to their phase-out and argued that any control measures would damage them economically. Richard Benedick, *Ozone Diplomacy 2*, 57 (1998). However once manufacturers saw the opportunity for a competitive advantage, they led the effort to develop chemical alternatives to ODSs. ODS users likewise were able to alter processes and products in a manner that saved

them money through the reduction of solvent use and waste disposal costs. *Id.* at 104. Ultimately, the original dire predictions of manufacturers and users failed to materialize.

Without strong regulation and oversight, the technology forcing mandates of the Act will not be fulfilled. The status of the implementation of the PSD and other CAA programs is analogous to the situation experienced at the inception of the Montreal Protocol. Industry will likely resist every effort to implement new or more stringent emissions control technology whenever that technology costs more. And it is understandable that industry would do just that, as its focus is to maximize profits. Without some sort of leverage, industry is not likely to move towards new technology. States cannot be counted on to fulfill this role because of the conflict of interest inherent in their need to attract industry for the benefit of their residents. EPA oversight is needed to provide that leverage, and ensure that the CAA and the innovations in technology it mandates are implemented.

Another illustration of the need for EPA oversight comes from the recent Texas Air Quality Study 2000. <http://www.utexas.edu/research/ceer/texaqsarchive/pdfs/EXEC_SUMMARY_Nov_02.pdf>. Texas learned that the ozone modeling assumptions it had been using for the past 30 years were incorrect. This experience emphasizes the need for a strong centralized process of information gathering and dissemination mentioned in the Williams article. Although there is room for innovation by the States, the EPA serves as an overseer to keep the States from going astray in their scientific calculations. EPA serves to ensure that innovations by the States are truly innovations and not merely empty promises of innovation.

While it is true that industry produces benefits for all citizens, there are other economic benefits and costs to

consider. One aspect of the economic analysis that is often overlooked is that savings for industry often result in other sectors of society bearing greater costs. For instance, EPA reports to Congress (required by Section 812 of the Act), have estimated that, by 2010, the economic benefits derived from the 1990 amendments to the Clean Air Act will total around $127 billion (mainly in health benefits), more than four times the cost of achieving those benefits. Furthermore, EPA estimates that there are many more benefits that are not presently quantifiable, such as benefits to crops and ecosystems and further health benefits. *See* EPA's *Final Report to Congress on Benefits and Costs of the Clean Air Act, 1990-2010* <http://www.epa.gov/oar/sect812/> & <http://www.epa.gov/history/topics/caa90/10.htm>.

Three of the arguments made by Petitioner strongly appeal to notions of common sense and fair play at first glance, but fail to withstand closer scrutiny. For example, Cominco's idea to use Low NOx on all seven generators, even those not requiring BACT analysis, has appeal because it could result in lower overall emissions than if SCR were used on only the two generators, MG-5 and MG-17. (Getting lower overall net emissions also requires the assumption that the two generators with SCR controls would be placed in standby mode; if all generators were run at operating capacity, then even this configuration would result in an increase of 79 tons per year.) J.A. 86-87. However, even the possible emissions reductions forecast under this scheme may be short-lived.

If Cominco decides to expand production further, then the net reduction in overall emissions quickly evaporates. For instance, if Cominco decided to install one more generator identical to MG-17 and were able to use Low NOx on that generator instead of SCR, the result would be a net increase of approximately 500 tons per year of nitrogen

oxide (NOx) emissions. J.A. 110, 198. Low NOx is the baseline control for the new generators, therefore using Low NOx as BACT on a new generator results in an emission rate of 530 tons per year and a reduction of 0%. (Low NOx results in emissions reductions on the older generators because they went online with lesser controls or none at all.) If Cominco expanded with two new generators, the increase in emissions using Low NOx would be 1060 tons per year; with three new generators 1590 tons per year, etc. On the other hand, SCR control as BACT would result in an emission rate of only 53 tons per year per generator, a reduction of 90% for each new generator installed.

In fact, the idea of expansion is not so far-fetched. Cominco originally planned a greater output with generator MG-5, but then reduced the emission increases from MG-5 in order to avoid modification and BACT review. J.A. 197. Presumably, if BACT at this time is determined to be SCR, it would be difficult to find that a lesser control is BACT for any future generators. Likewise, a determination that Low NOx is BACT for the current modification makes it that much easier for Cominco (or a similar facility) to obtain a determination that Low NOx is BACT in the future.

Secondly, Petitioner's analysis of the reasons for giving a State some flexibility in its BACT determination is similarly flawed when applied to the facts of this case. Petitioner refers to a situation in which a State, concerned about the impact of increased costs on a critically important employer, decides to allow that employer to implement a less stringent, less costly technology, presumably to keep that employer from leaving the area. Pet. Brief 24. This appears to be precisely the reason for allowing a less stringent control technology for Cominco – the fact that the Red Dog Mine offers employment in a remote area with few other opportunities for employment. *Id.* at 9-13. The flaw in this

argument is that there is no danger here that the mine will relocate; the zinc deposits are in the ground and must be mined where they are found.

Thirdly, Cominco and Alaska asserted that the increased costs of using SCR would reduce the mine's competitiveness on the world market and have adverse economic impacts. Ordinarily, these factors might provide a reasoned justification for allowing a less stringent BACT determination on the basis of economic infeasibility. However, no economic analysis was offered to bolster the claims of economic infeasibility. J.A. 116. Rather, Cominco and Alaska simply relate that Cominco's Red Dog Mine is the largest producer of zinc concentrate in the world and the royalty payments from the mine to the Inupiat shareholders are expected to total $1 billion over the life of the mine. Pet. Brief 8-9. Even if SCR were run on the new generator for 40 years (at a $2.9 million initial capital cost and $635,000/year in operating costs), the total cost of its operation would amount to only about two percent of the expected royalty payment. J.A. 113. Generally, royalty payments are substantially less than the profits expected from a business venture, therefore it is hard to imagine how using SCR could be economically infeasible for Cominco. And, in fact, ADEC found SCR was economically feasible in its preliminary technical analysis. J.A. 84. In its final technical analysis, ADEC admits that Cominco failed to present it with detailed financial information, making analysis of the economic feasibility of SCR impossible, nevertheless, ADEC still allowed a less stringent technology as BACT. J.A. 116.

This all leads directly to EPA's and the Ninth Circuit's logical conclusion that ADEC failed to offer a reasoned justification for its BACT determination. Pet. App 12a-13a. Even if Alaska is correct in its argument that EPA should be

required to show that the State's decision is arbitrary and capricious, the above economic information should suffice to do so. Pet. Brief 36. The burden should then shift to the State to show that its actions were not arbitrary and capricious. On the facts of this case, the State of Alaska cannot meet this burden. As the Ninth Circuit pointed out, Alaska's analysis was "uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority – to protect states from industry pressure to issue ill-advised permits." Pet. App. 16a.

Finally, the desire for certainty in the permitting process, although understandable, fails to support the argument against EPA oversight authority in BACT determinations. Amici States North Dakota, et.al., (States) and National Environmental Development Association, et.al., (NEDA) argue that EPA's intrusion into the State role of determining BACT injects an unacceptable level of uncertainty into the permitting process. States' Brief at 15, NEDA Brief at 11. Indeed, the costs involved in facility construction are great, and uncertainty as to the proper control technology could create a difficult situation for industry if they proceed with construction under an incorrect assumption as to which is the proper technology. However, it could be just as easily argued that the uncertainty stems from EPA's failure to consistently enforce the requirements of the Act as mentioned above. If EPA would strictly enforce the Act and industry could rely on that strict enforcement, that consistency would also provide the desired measure of certainty.

The need for EPA enforcement is now more necessary than ever. Although it is desirable for the State to play the primary role under the system of cooperative federalism, that role is presently strained in many States due to their huge budget deficits. Even if a State may wish to perform its role

in an exemplary fashion, it may not have the capability to do so. As Dr. Barry L. Johnson said in his testimony before Congress, "Now is not the time to gamble with unproven administrative procedures that may set back the progress already made." Although industry seems to look upon EPA as a sword, there are those who look upon EPA as a shield, and breathe easier with EPA's oversight in the tremendously complex process of implementing the Clean Air Act.

CONCLUSION

For the foregoing reasons, the judgment below should be upheld. Short of that, the case should be remanded for further proceedings.

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In The
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE VERMONT, CALIFORNIA, CONNECTICUT, MAINE, MASSACHUSETTS, MICHIGAN, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OREGON, RHODE ISLAND, WISCONSIN, AND THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

The amici States,[1] who share responsibility for enforcing the Clean Air Act with the federal Environmental Protection Agency (EPA), have two important interests in the outcome of this case.

First, the amici, like all states, have a fundamental interest in protecting the health and welfare of their citizens. In the view of the amici States, EPA's authority to enforce the Clean Air Act is critical to attaining our national goal of reducing and preventing air pollution.

Second, the amici have a specific interest in supporting EPA's authority to enforce the Best Available Control Technology (BACT) provision of the Act's Prevention of Significant Deterioration of Air Quality (PSD) program. Although the Act gives States primary responsibility to determine BACT for new major stationary sources, the amici States agree with the United States that EPA should and does have limited oversight authority with respect to BACT determinations.

While it may seem counterintuitive for States to take a position in support of federal authority, amici States are specifically concerned about the BACT requirement. The amici States agree with the petitioner State of Alaska – and Alaska's amici – that States bear primary responsibility for achieving

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1 The Pennsylvania Department of Environmental Protection received written consent from the parties to join this brief. The letters of consent have been filed with the Court. This brief was not written, in whole or in part, by counsel for a party. No person or entity, other than amici, made a monetary contribution to the preparation or submission of this brief.

the goals of the Clean Air Act. In the PSD program, States have discretion to make BACT determinations and, as Alaska correctly argues, EPA cannot "second guess" a State's reasonably justified decision merely because EPA would reach a different conclusion.

Nonetheless, the amici States view EPA's limited oversight role, as recognized by the Ninth Circuit in this case, as a necessary part of the cooperative federalism embodied in the Clean Air Act. A State's discretion to reach a BACT determination is not unbounded; the permitting authority must apply the statutory criteria and must present a reasoned justification for its decision. The existence and enforcement of the BACT requirement *nationwide* protects the interest of States by removing the incentive for industry to "shop around" for a more lenient permitting process.

Federal oversight thus provides a necessary backstop and contributes to consistent application of the Act. EPA rarely questions State BACT determinations, but its ability to do so in narrow circumstances serves the interest of all States by assuring that each State carries out its obligations under the Act.

STATEMENT OF THE CASE

Congress enacted the Clean Air Act as a partnership between state and federal governments. The centerpiece of the Act is found in sections 108 through 110 of the Act, under which EPA sets nationally applicable ambient air quality standards. *See* 42 U.S.C. §§ 7408-7410. States may then

develop and implement plans for achieving and maintaining air quality that meets those standards. In addition, Congress enacted other nationwide programs that must be implemented in each State, regardless of the air quality in the State.

The Prevention of Significant Deterioration of Air Quality (PSD) program is one such program. These provisions regulate air pollution in certain areas, known as "attainment" areas, where air quality meets or is cleaner than the national ambient air quality standards ("NAAQS"), as well as in unclassifiable areas. 42 U.S.C. §§ 7470-7479.

The PSD provisions are implemented by a regulatory process that requires pre-construction permits for new major stationary sources, such as the facility in this case. *See* 42 U.S.C. §§ 7475, 7479(1). States that issue PSD permits (1) must determine that the permitted source would neither exceed the allowable increments for the area nor cause a violation of the applicable NAAQS;[2] and (2) must require that the facility be "subject to the best available control technology" for each pollutant regulated under the Act. 42 U.S.C. § 7475(a)(4).

The BACT requirement is one of the principal substantive requirements of the PSD program. *See Alabama Power v. Costle*, 636 F.2d 323, 407 (D.C. Cir. 1980). All new sources located in an attainment area in a given State must comply with BACT regardless of the other strategies that the

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2 The requirement that a State cannot exceed its PSD allowable increments is a distinct requirement of the PSD program and is not at issue in this case. 42 U.S.C. § 7476.

State may have in place under section 110 to maintain compliance with each NAAQS. The term BACT is defined in the Act (and similarly by the State of Alaska) as follows:

> "[B]est available control technology" means an emission limitation based on the *maximum degree of reduction* of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility ***.

42 U.S.C. § 7479(3) (emphasis added); *accord* Alaska Admin. Code tit. 18, § 50.990(13) (defining BACT as "the emission limitation that represents the maximum reduction achievable for each regulated air contaminant, taking into account energy, environmental and economic impacts, and other costs").

As the definition demonstrates, a permitting authority must analyze, evaluate and present a reasoned justification for its BACT determination before it issues a permit for a specific source. *Id.*; *see* Alaska Admin. Code tit. 18, § 50.310(d)(3) (Alaska's PSD regulations require "a demonstration that the proposed limitation represents the best available control technology for each air contaminant and for each new or modified source"); *see also* Pet. App. at 3a. Indeed, one of the explicit

Congressional purposes of the PSD program is that permitting decisions are made "only after careful evaluation." 42 U.S.C. § 7470(5).

The Act also gives EPA enforcement authority. Section 113 of the Act regulates federal enforcement of the Act's requirements, and section 167 provides for federal and state enforcement of the PSD provisions. *See* 42 U.S.C. §§ 7413, 7477.

Section 167 requires EPA to "take such measures" when it is "necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." 42 U.S.C. § 7477. Section 113 authorizes EPA to "issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies" or "issue an administrative penalty order" to a State that "is not acting in compliance with any requirement or prohibition" of the PSD provisions. *Id.* § 7413(a)(5).

In this case, EPA used its limited authority to address a violation of the BACT requirement. Pet. App. at 7a. EPA issued three enforcement orders to the Alaska Department of Environmental Conservation ("Alaska") and Cominco Alaska Incorporated ("Cominco"). *Id.* at 2a. These orders effectively invalidated the PSD permit issued to Cominco by Alaska for failure to comply with the BACT requirement of the Act. *Id.* Alaska and Cominco petitioned the Court of Appeals for the Ninth Circuit for review of the orders. *Id.* at 6a. Both Alaska and Cominco claimed that the EPA exceeded its authority by issuing the enforcement

orders and that Alaska acted within its discretion when making its BACT determination. *Id.*

The Ninth Circuit rejected these arguments and found that EPA had properly exercised its enforcement authority. Pet. App. at 7a. In reaching its decision, the court found that sections 113 and 167 apply to the BACT requirement. *Id.* at 9a (holding that subjecting a facility to BACT is a "requirement" under both section 113(a)(5) and section 167). It next found that these enforcement sections grant EPA the authority to ensure that States present a reasoned justification for their BACT determinations. *Id.* at 10a-11a. The Ninth Circuit sustained EPA's enforcement orders, finding that the record supported EPA's conclusion that Alaska failed to justify its BACT determination. *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The "States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). As part of this "system of shared federal and state responsibility," the Clean Air Act grants to States the primary authority to determine BACT. Pet. App. at 3a; 42 U.S.C. § 7479(3). However, States were not delegated the *exclusive* role and do not have *absolute* discretion in making BACT determinations. As the federal agency that enforces the Act, EPA has limited authority to ensure that a State provides a reasoned justification for its BACT determination. EPA's oversight promotes the important goals of the Clean Air Act and does so without disrupting or burdening the

State permitting process.

When it created the BACT requirement, Congress sought to balance the significant discretion that States would need to implement the PSD program with the necessary federal oversight that would be required to fulfill the program's goals. Federal oversight of the BACT requirement serves three important goals of the Act.

First, Congress recognized that States should not have to choose between maintaining a high level of air quality and promoting industrial development within their borders. EPA's authority ensures a reasonable level of consistency among BACT determinations nationwide. Consistent application of the Act promotes economic development in an even manner throughout the country without unduly interfering with States' authority under section 110 to determine how best to protect their air quality.

Second, technological advancements are basic to any effective program of pollution control that both stimulates economic growth and protects air quality. The technology-forcing goals of the BACT provisions can only be attained, however, if States make BACT determinations in a reasoned manner. EPA's limited enforcement authority ensures that States will fulfill this obligation.

Third, air pollution does not respect State boundaries. Without proper implementation of the BACT requirement, States that desire to retain clean air will have little hope of doing so. Federal enforcement of the BACT requirement protects

States and their citizens from regional increases in air pollution caused by unsupported BACT determinations.

EPA's limited oversight of the BACT requirement promotes these goals without disrupting the State permitting process. EPA's action does not alter the relationship that States have always had with the federal government with respect to BACT determinations. Notwithstanding EPA's ability to oversee BACT decisions, States retain primary authority to determine BACT for new pollution sources and have broad discretion and flexibility to do so. Alaska and its amici overstate the consequences that accompany EPA's infrequent use of its limited oversight authority. States will continue issuing permits, as they have over the past two decades, with EPA playing a limited, but critically important, oversight role.

ARGUMENT

I. LIMITED EPA OVERSIGHT AUTHORITY OF THE BACT REQUIREMENT ENSURES THAT THE GOALS OF THE PSD PROGRAM ARE FULFILLED

The Clean Air Act establishes a comprehensive program for controlling and improving the nation's air quality in which the "States and the Federal Government [are] partners." *General Motors Corp. v. United States*, 496 U.S. at 532. Congress has been attentive to the delicate federal-state balance of the Act, and its design of the PSD program is no exception. Despite granting States "broad flexibility" in making BACT decisions, Congress

provided "the parameters for that decision" in the text of the Act. S. Rep. No. 95-127, at 31 (1977). Congress directed that a new source be required to achieve the maximum degree of reduction of pollutants emitted from the source that is "achievable." *See* 42 U.S.C. § 7479. In making this determination, States must "take into account energy, environmental, and economic impacts and other costs of the application of BACT." S. Rep. 95-127, at 31; *see* 42 U.S.C. § 7479.

Congress recognized that these "[n]ational guidelines on prevention of significant deterioration [such as BACT] are essential to guarantee the individual States the right to decide to maintain air quality superior to minimum Federal standards." H.R. Report No. 95-294, at 136 (1977). Therefore, it necessarily follows that Congress contemplated that EPA would have the authority to ensure compliance with those guidelines. When Congress created the BACT requirement, it sought to balance the significant discretion that States would need to implement the program with the necessary federal oversight that would be required to fulfill the program's goals.

This necessary federal oversight is limited. Congress relegated EPA to a "sharply restricted role" in the program whereby its role would essentially be "one of monitoring State actions." S. Rep. 95-127, at 12, 36. EPA, however, "could go to court to stop a permit for activities which would exceed the increment of pollution or which otherwise did not comply with the requirements of this section, *including the use of best available control*

technology." S. Rep. 95-127, at 12 (emphasis added).

The limited oversight authority granted to EPA serves the goals of the PSD program and is consistent with the purpose of requiring BACT. Requiring new sources to install the best available control technology: (1) promotes consistent application that protects States' environmental and economic interests; (2) promotes the technology-forcing design of the PSD program; and (3) minimizes trans-boundary air pollution problems. To achieve these goals, Congress gave EPA the authority to correct a BACT determination when a State permitting authority fails to provide a reasoned justification for its decision.

A. Federal Enforcement Of The BACT Requirement Promotes Consistent Application That Protects States' Environmental And Economic Interests

Congress recognized that States should not have to choose between maintaining a high level of air quality and promoting industrial development within their borders. Accordingly, it designed the PSD program to ensure that "economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). Although Congress charged States with making the determination of what is BACT for a given application, Congress did not intend for BACT determinations to vary widely from State to State with no federal mechanism to correct unreasoned or wholly inconsistent determinations. EPA's limited authority to enforce the BACT requirement serves to

maintain a reasonable level of consistency among States, which, in turn, ensures even economic development across the country.

The BACT requirement, like the other PSD provisions, is "an equalizer, enabling all areas of the country to join in the fight for clean air without fighting each other." H.R. Rep. 95-294, at 134. The promotion of economic growth throughout the country without prejudice to certain States is a compelling reason that supports EPA's limited oversight of BACT determinations.

Without EPA oversight of the PSD guidelines, such as the BACT requirement, "the very States demonstrating a concern for preserving existing clean air seriously risk having their economic base undermined." H.R. Rep. 95-294, at 135. States that make more stringent BACT determinations would find themselves at a "substantial competitive disadvantage" with other States because of the "strong incentive for industry to 'shop around' for States or localities with large clean air resources and weak pollution control standards." *Id.* at 133.

In fact, States that wish to maintain a high level of air quality by requiring the most effective controls could face a "double threat." H.R. Rep. 95-294, at 134. Not only would they lose existing industrial plants to more permissive States but, in addition, they "will likely become the target of 'economic-environmental blackmail' from new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls." *Id.*

Although the facts in this case do not suggest that "economic-environmental blackmail" occurred, these concerns exist in other parts of the country. Of course, Cominco cannot move its facility elsewhere if it is dissatisfied with Alaska's permitting decisions. However, many, if not most, of the new sources subject to the PSD provisions have a great deal more flexibility in deciding where to locate. In order to attract new industrial facilities, such as automobile assembly facilities or computer manufacturing plants, States commonly offer economic incentives. Without the backstop provided by federal oversight of the PSD provisions, including the BACT requirement, States could feel pressure to apply the PSD requirements leniently in order to compete with other States for new facilities.

If EPA has authority to ensure a reasonable level of consistency among BACT determinations nationwide, then every State can feel more confident about maintaining stringent standards without fear of losing its current industry or alienating prospective industry. Such an atmosphere will promote economic development in a more even manner throughout the country while maintaining air quality.

B. Limited EPA Oversight Promotes The Technology-Forcing Goals Of The PSD Program

The relevant legislative history demonstrates that Congress gave States discretion to determine BACT on a case-by-case basis as a way of accomplishing the technology-forcing goals of the Act. Contrary to the arguments made by Alaska, Congress was not

motivated solely by concerns for state autonomy when it gave States broad discretion to make BACT determinations.

Technological advancements are "basic to any effective program of pollution control" that both stimulates economic growth and protects air quality. S. Rep. 95-127, at 17. This is embodied in a Senate report of the 1977 Amendments, which describes the "philosophy of encouragement of technology development" fostered by the Act. *Id.* at 18. The desire to promote technological innovation in the PSD program was therefore of paramount concern to Congress. EPA's limited oversight authority ensures that State BACT determinations promote this goal.

By enacting the 1977 Amendments, Congress specifically sought "to induce, to stimulate, and to augment the innovative character of industry in reaching for more effective, less-costly systems to control air pollution." S. Rep. 95-127, at 18. However, the goal of developing more effective and less expensive ways to control air pollution was not the only motivation behind Congress's intent to promote advances in technology in the PSD program. Congress recognized the broader notion that "[t]echnological improvements have enabled this Nation to establish the greatest industrial plants in the world, providing American workers with the highest pay and best working conditions, in return for high productivity." S. Rep. 95-127, at 17. Accordingly, Congress structured the 1977 Amendments to foster the national goal of

promoting technological advancement whenever possible.

Of all the provisions in the Amendments that affect technology, the PSD provisions are "[p]ossibly the most important." S. Rep. 95-127, at 18. The goal of promoting technology was precisely the reason that Congress did not specify control devices for new sources in the PSD program. States are not forced to assign pre-determined control measures but, rather, can encourage the development of new technology when appropriate. As a Senate report acknowledges, giving States the ability to determine BACT on a case-by-case basis "allows the adoption of improvements in technology to become widespread far more rapidly than would occur with a uniform Federal standard [of BACT]." *Id.* at 31.

The technology-forcing goals of the BACT provisions can only be attained, however, if States make BACT determinations in a reasoned manner, consistent with the statutory requirements. If States have unreviewable, unfettered discretion to decide on BACT, States may be pressured to avoid making permitting decisions that require and promote technological innovation, as intended by Congress. EPA's limited oversight authority ensures that States determine BACT in a reasoned manner, and thus carry out Congress's intent to foster new and better technologies for pollution control.

C. The BACT Requirement Helps Minimize Trans-boundary Air Pollution Problems

The problem of interstate air pollution transport has been of concern throughout the past three

decades. The reason is simple: "Air is no respecter of political boundaries; a community that sets and enforces strict standards may still find its air polluted from sources in another community or another State." President's Message on the Environment, February 10, 1970, 116 Cong.Rec. 32909. Although BACT is determined by the permitting States, other States will be affected by the emissions from a new source. Congress expressed this concern explicitly in section 160 of the Act. *See* 42 U.S.C. § 7470(4) (Congressional purpose of the PSD program includes assuring that "emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State").

In part, this is why Congress enacted the PSD provisions. It sought to create a "policy of prevention of significant deterioration which controls a new source's emissions to the maximum extent practicable [to] help minimize the transport and buildup of pollutants from one area to another." H.R. Rep. 95-294, at 135. Congress recognized that "without national guidance on prevention of significant deterioration and protection for States exercising their right to maintain clean air, that right will be meaningless." *Id.* at 136.

Without proper implementation of the PSD provisions, including EPA's authority to ensure that BACT determinations are carefully evaluated, "those States which desire to retain clean air will have little hope of maintaining superior air quality." H.R. Rep. 95-294, at 136. This is because, "while emissions

may not be 'significant' in the area of origin, when transported to another area and combined with pollutants from other areas, air quality may be drastically degraded." *Id.*

To be sure, the PSD provisions were not created to "stand alone" as the sole mechanism to mitigate interstate transport of air pollution. They work in conjunction with other sections of the Act, such as sections 116 and 126.[3] *See, e.g.*, 42 U.S.C. §§ 7416, 7426. It is clear, though, that requiring sources to use the best available control technology, by itself, will reduce "emissions for each new source" and minimize "the impact on limited air resources." H.R. Rep. 95-294, at 135.

To achieve the critical goal of reducing interstate transport of pollutants, EPA must be able to review and correct BACT determinations that are not supported by a reasoned justification. All States must make consistent and reasoned BACT determinations. Federal enforcement assures that each State will, in fact, make BACT determinations in this manner, thereby protecting States and their citizens from regional increases in air pollution caused by unsupported BACT determinations.

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3 Section 116, with limited exceptions, allows States to adopt and enforce "any standard or limitation respecting emissions of air pollutants or [] any requirement respecting control or abatement or air pollution," so long as it is more stringent than an existing standard. 42 U.S.C. § 7416. Section 126 allows States to petition EPA for a finding that "any major source" is emitting or will emit prohibited air pollutants. Id. § 7426.

II. EPA'S LIMITED OVERSIGHT ROLE DOES NOT DISRUPT THE STATE PERMITTING PROCESS

Alaska and its amici overstate the possibility that EPA oversight will disrupt or undermine the State permitting process, for three reasons: (1) EPA oversight of BACT determinations is nothing new; EPA has consistently claimed this authority and has rarely exercised it; (2) State processes will not become superfluous, as States still bear primary responsibility for determining BACT; and (3) the suggestion that EPA will abuse its enforcement power and will invalidate permits "years" later is unfounded.

First, there is nothing remarkable about EPA's limited authority to enforce the BACT requirement. EPA's assertion of authority in this case does not represent or indicate an alteration in the relationship that States have always had with EPA with respect to BACT determinations. EPA has for years consistently maintained that BACT determinations involve "the exercise of judgment," but require correction by EPA when the decision is "not based on a reasonable analysis." Memorandum from Michael S. Alushin, EPA Associate Enforcement Counsel for Air (July 15, 1988) (JA 273-74). If anything, the attention directed at this case only illustrates how rarely EPA exercises this authority. States will continue issuing permits, as they have over the past two decades, with EPA playing a limited, but critically important, oversight role.

Second, EPA's limited oversight role does not make State permit processes superfluous. States unquestionably still bear primary responsibility for determining BACT. EPA appropriately recognizes that a State must only make a "legally supportable" BACT determination– one that provides a "reasoned justification for its selection of BACT." Pet. App. at 13a-14a. As the United States has represented to this Court, EPA's authority extends to "those rare occasions where a permitting authority acts outside the bounds of its discretion." Brief for Respondents in Opposition at 6.

Most States, including Alaska, already have in place regulations that require precisely the kind of reasoned BACT determination that would foreclose EPA intervention. *See, e.g.*, Alaska Admin. Code tit. 18, § 50.310(d)(3) (requiring "a demonstration that the proposed limitation represents the best available control technology for each air contaminant for each new or modified source"); *see also* ME ADC 06-096 Ch. 115, § 4 (requiring that the "applicant must demonstrate that each emissions unit to be constructed, reconstructed or modified will receive BACT"). Therefore, EPA simply does not routinely step in and correct State BACT determinations.

Because EPA's ability to oversee BACT decisions is very narrow, Alaska's claim that EPA will be able to "veto" a State's BACT determination, rendering the State permitting process superfluous, is unfounded. Notwithstanding EPA's limited oversight authority, States still have the primary authority to determine BACT for new pollution sources, and have broad

discretion in making their decision. Given the limited nature of EPA's role, Alaska and its amici are incorrect to suggest that permit applicants will bypass the State process and negotiate directly with EPA.

Third, Alaska's fear concerning EPA's ability to challenge permits in the "months, even years, after a permit has been issued" is misplaced. *See* Pet. Brief at 35. The facts in this case demonstrate that EPA objected to Alaska and Cominco well before the permit was issued. Alaska also discounts the fact that EPA's enforcement against a State or a source is subject to judicial review. The federal courts are well suited to provide meaningful review to States and sources that contest actions taken by EPA. *See* 42 U.S.C. § 7413(b) (for an action brought by EPA in district court to enforce an order); 42 U.S.C. § 7607(b)(1) (for a petition for review filed with the court of appeals). Furthermore, a court under a different scenario could scrutinize whether EPA's failure to challenge a permit within a reasonable time period should preclude EPA's action. *See U.S. v. AM General Corp.*, 808 F.Supp. 1353, 1367 (N.D. Ind. 1992), *aff'd*, 34 F.3d 472 (7th Cir. 1994) (finding that EPA could not enforce against a source for modifying its facility pursuant to an invalid permit because EPA did not act until after the source had begun operations under the terms of that permit).

In sum, when States fail to present reasoned justifications for their BACT decisions, federal enforcement does nothing more than provide the necessary "backstop" to ensure that those States

do not abuse the discretion that Congress afforded to them. Alaska and its amici inflate the consequences that accompany EPA's infrequent use of its limited oversight authority.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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